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THE MODERN LAW REVIEW

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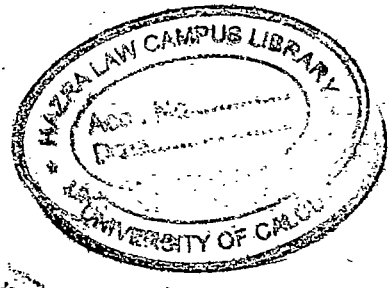
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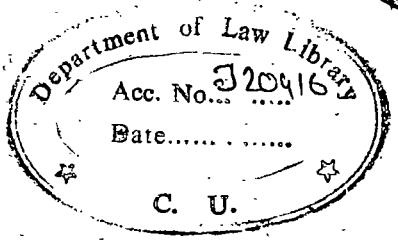
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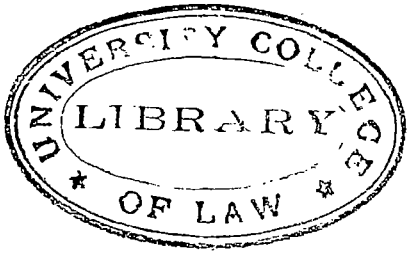
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THE
MODERN LAW REVIEW

Volume 9 April 1946 No. 1

STIPENDIARY MAGISTRATES AND LAY JUSTICES

FROM time to time criticism of lay justices becomes general, and the view is put forward that they should be replaced by stipendiary magistrates. As the controversy goes on, a number of lawyers, including present or past holders of the Great Seal, let it be known that in their view the system of lay justices should be retained. The last bout of this recurrent controversy began with the Report of a Sub-Committee of the Conservative Party, published in February, 1945. Correspondence in the London *Times* culminated in a leading article on April 4, 1945. A debate in the House of Lords on homeless children, on March 29, brought some weighty views in favour of lay justices. On October 19, 1945, the Lord Chancellor in addressing the Magistrates' Association said that he did not contemplate doing away with 'the great unpaid', but announced that he hoped a Royal Commission would be appointed to make recommendations on various questions relating to the magistracy.

In the *Modern Law Review* for March, 1945, Lord Chorley wrote upon 'The Unpaid Magistrate and his Future'. As I am still associated officially with various matters concerning magistrates it would not be right for me to plunge into this controversy, but in any case I do not want to do so. On many matters concerning the administration of justice we want more inquiry rather than more opinions. I have listened to many discussions about lay justices and stipendiaries, and found that the best contribution I could make was to supply information on some aspects of the setting of the question. I hope to follow this with a further paper on the administrative machine behind magistrates' courts, and on other outstanding problems, particularly procedure.

The appointment of stipendiary magistrates outside London and Manchester was first authorised by section 99 of the Municipal Corporations Act, 1835. If the council of a borough thought that it was requisite that a police magistrate or magistrates should be appointed, the council could make a by-law fixing the amount of salary they were prepared to pay, and

transmit the by-law to the Secretary of State. It should thereupon be lawful for His Majesty to appoint one or more persons, being barristers of at least five years standing, to be during His Majesty's pleasure police magistrate and a justice of the peace for the borough, and to direct payment quarterly of a salary not exceeding the sum stated in the by-law. There was a proviso that on a vacancy no new appointment should be made until the council made a new by-law and applied to the Secretary of State. The substance of the 1835 Act was reproduced in the Municipal Corporations Act, 1882, s. 161, with some change in language; the council now petitions for a stipendiary magistrate, who must be a barrister of seven years standing.

The Stipendiary Magistrates Act, 1863, authorises the appointment of stipendiary magistrates in places that are now known as urban districts where the population exceeds 25,000. The procedure for an appointment follows that of the Municipal Corporations Acts. There is no provision for the appointment of stipendiaries for rural districts or counties. Where a stipendiary is required for an area that is not coterminous with a municipal borough or urban district, a local Act is necessary.

There is little doubt that the framers of this legislation thought that there would be a widespread use of stipendiaries. The preamble to the 1863 Act recites:

> Whereas the execution of the office of justice of the peace within populous cities and places in England and Wales has become difficult and burdensome, the great and increasing extent of the populations therein, and the difficult and important legal questions that arise under various public and private acts, creating unreasonable demands upon the time of justices . . .

There is at present no appointment made under the 1863 Act, and I have been unable to discover a single instance of an appointment under it. The Municipal Corporations Acts have also produced fewer stipendiaries than might have been expected. Liverpool and Worcester had stipendiaries appointed in 1836, and then no appointments were made until those of Kingston-upon-Hull and Newcastle-on-Tyne in 1854. Between 1850 and 1900 fourteen boroughs got stipendiaries, and three boroughs during this century, the most recent being Huddersfield in 1931. Local Acts of last century created seven areas for stipendiaries.

The total of the number of places for which stipendiaries have been appointed is therefore twenty-six, but vacancies are not necessarily filled; if the local council does not choose to

petition, no appointments can be made, and the place may cease to have a stipendiary altogether or for a period until the council changes its mind. There are at present (January, 1946) sixteen stipendiary magistrates serving seventeen areas. In the following list those marked with an asterisk are appointed under local Acts, the rest being appointed under the Municipal Corporations Act, 1882: Birmingham, Bradford, Cardiff, East Ham, Huddersfield, Kingston-upon-Hull, Leeds, Liverpool, Manchester City, Merthyr Tydfil,* Middlesbrough, Pontypridd,* Salford,* Staffordshire Potteries,* South Staffordshire,* Swansea and West Ham. East Ham and West Ham since 1943 have shared a stipendiary. No place has more than one stipendiary. Manchester City had two stipendiaries from 1903 to 1909.

Nine places have in the past had stipendiaries and have not made any application for further appointments. In six of these places, marked with an asterisk in the following list, there was only one appointment: Birkenhead,* Brighton, Chatham and Sheerness, Grimsby,* Manchester Division, Newcastle,* Sheffield,* South Shields,* Worcester.* I think that the only instance of a place ceasing to have a stipendiary and later asking for one is Swansea, where there was a vacancy from 1901 to 1923.

The salaries of stipendiaries, which are paid out of local funds, vary up to a maximum of £1,850. There is no general provision for a retiring age or for superannuation. A stipendiary sitting alone, has the powers of two or more justices.[1] In three instances he has sole jurisdiction,[2] but the ordinary rule is that he and the lay justices have concurrent and equal jurisdiction. Whether a stipendiary does sit alone or with some lay justices, he acts as chairman, and the decision is that of the majority,[3] and if he sits with one lay justice and they disagree he has no casting vote and cannot overrule his colleague.[4] In areas having stipendiaries there are also courts

[1] Indictable Offences Act, 1848, s. 29; Summary Jurisdiction Act, 1848, s. 33; Summary Jurisdiction Act, 1879, s. 20; Interpretation Act, 1889, s. 13.

[2] Trade Union Acts, 1871 and 1876; Conspiracy and Protection of Property Act, 1875; Law of Distress Amendment Act, 1908.

[3] I do not think that this has ever been questioned, but there is no judicial authority for it unless it can be inferred from the case cited in footnote (4). It originated in Home Office advice based on an opinion of the Law Officers in 1855.

[4] In *R.* v. *Thomas, Ex p. O'Hare*, [1914] 1 K.B. 32, a stipendiary had sat with one lay justice and they had failed to agree. The stipendiary then said that he must decide the case himself, the lay justice said 'Very well', and the stipendiary convicted. The conviction was upheld on the view that the lay justice had withdrawn from adjudicating and the court became the stipendiary alone.

composed of lay justices. Where there is a large volume of work, requiring say three or four courts sitting simultaneously, or even seven courts at times as in Birmingham, the stipendiary does a far smaller proportion of the work than the lay justices. In other areas he may do half the work.

The summary judisdiction of lay justices is organised on the basis of county divisions, boroughs with separate commissions of the peace, and a few special jurisdictions.[5] A list of magistrates' courts is given in *The Local Government Manual and Directory*, published annually. County divisions are not often changed, as the procedure is clumsy,[6] and new borough commissions of the peace are not often granted.[7] There are about 1,000 courts, but it is not worth giving the exact figure because of the organisation inside county divisions and to a less extent inside boroughs. The justices for a county division may have more than one court-house and have regular sessions at more than one place. Provided the places are appointed and days fixed, there is no particular formality about such arrangements. Some county divisions have definite sub-divisions, either with the same clerk or with different clerks.[8] In boroughs the justices may also hold courts in more than one place. In large cities there is much to be said for the system of having a central court-house for the bulk of the work, but having some court-houses in outlying parts for certain work. There is also a curious system in some boroughs that have not got separate commissions of the peace, and where the mayor and ex-mayor, as statutory justices,[9] hold what is called the borough court for borough business, whilst the justices for the county division which includes the borough hold a separate court for non-borough cases.[10] If, therefore, by the number of magistrates'

[5] An example is Romney Marsh.

[6] Divisions of Counties Act, 1828; Petty Sessional Divisions Acts, 1836 and 1859. The Justices' Clerks Committee, Cmd. 6507, 1944, para. 100, recommended a new method of determining county divisions.

[7] Commissions of the peace are granted by the Crown on the petition of a borough council; Municipal Corporations Act, 1882, s. 156.

[8] Where courts are usually held at more than one place a salaried clerk may be appointed for each place, Justices' Clerks Act, 1877, s. 5. The unit remains the whole division, and the justices for the whole division must appoint the clerk for each court or sub-division.

[9] The Local Government Act, 1933, s. 18, which does not apply to London, provides that the mayor of a non-county borough shall be a justice for the borough and for the county, whilst the ex-mayor is a justice for the borough for one year.

[10] The whole thing is a muddle, because if a borough has no separate commission of the peace it is merely an undivided part of the county division in which it is situate, and business cannot be ascribed to part of the whole nor, if statute had not provided otherwise, would it seem possible for a man to be a justice for part of the area. As a person appointed mayor may not have had any

courts we mean the number of different places at which justices hold courts, the number is substantially more than 1,000, and is subject to fluctuations as various court-houses are brought into use or discontinued.

The list in the *Local Government Manual* gives the days on which each court sits, but that does not give an accurate basis for computing the number of sittings, because additional sittings may be held and more than one court may sit simultaneously. Thus, a borough which is listed as having daily sittings may, in fact, have six courts a week, or ten or twenty or more. There is no regular return, published or unpublished, that gives the actual number of sittings throughout the country.

Some estimate of the amount of work done by magistrates' courts can be made from the volumes of the *Criminal Statistics*, but the gaps in the information given are serious. Thus, the statistics give the number of orders made in the exercise of matrimonial jurisdiction, but no figures are available for subsequent applications to the court. A single order for wife maintenance may mean a number of subsequent proceedings for enforcement, variation or discharge, each of which may take up a substantial amount of time. The Money Payments (Justices' Procedure) Act, 1935, by requiring a means inquiry before committal for non-payment of a fine or periodic payment, has greatly increased the work of the courts, but this is not shown in the *Criminal Statistics*.

Everyone knows that in London the metropolitan magistrates do the bulk of the work, but the amount of the work done by lay justices is not always appreciated. First, the metropolitan magistrates' courts only serve part of the central area; apart from the stipendiary for East Ham and West Ham, the rest of the area of Greater London is served by lay justices, and this accounts for nearly half the population. Second, in the area of the metropolitan magistrates' courts the lay justices continue to do a substantial volume of work,[11] including virtually the whole of the work of the juvenile courts.

previous experience of acting as a justice, this arrangement may mean that such a 'borough court' is composed of a mayor with very little experience, and an ex-mayor with but little more. There is so much doubt about this jurisdiction that an ex-mayor of a borough without a separate commission is well advised not to adjudicate, but as that makes it impossible to hold a 'borough court' it is not welcome advice.

[11] The type of work done in the sixteen petty sessional divisions varies: liquor licensing, and summonses for rates, are general, whilst weights and measures and some other local authority prosecutions are taken at some courts. The Departmental Committee on Courts of Summary Jurisdiction in the Metropolitan Area, 1937, recommended an extension of the work of the lay justices, and more co-ordination with the metropolitan magistrates' courts. The policy

It is generally agreed that some reorganisation of magistrates' courts is needed. A number of small boroughs have separate commissions of the peace, thus having their own court with a small volume of business. The court for an adjoining county division is commonly held in the borough, so that an area that could be treated as a whole is served by two courts. On the 1931 census the figures are :—

Boroughs with Separate Commissions of the Peace

Population under 5,000					...	28
,,	over 5,000	and	under	10,000	...	32
,,	,, 10,000	,,	,,	15,000	...	29
,,	,, 15,000	,,	,,	20,000	...	12
,,	,, 20,000	,,	,,	25,000	...	13

The Justices' Clerks Committee recommended that separate commissions of the peace should, in general, be abolished for all boroughs with less than 25,000 population.[12]

A review of existing petty sessional divisions is also needed.[13] Changes in population and methods of transport mean that the location of court-houses needs reconsideration. This is not an easy matter when it comes down to practical planning. The main points that emerge are :—

(1) At present three needs have to be met: (a) the hearing of applications and the trial of cases, (b) people who want to consult the clerk, and (c) the handling of periodical payments. As to (b), justices' clerks do a large amount of advising the police and private persons; some of this advising is really incompatible with their status,[14] but they perform a public service that should and probably will soon be put on a proper basis. Much work is being done to see that the police have adequate facilities for obtaining legal advice, and the implementation of the Rushcliffe Report [15] will provide legal advice centres. As to (c), the main business is husbands paying weekly sums to the court and the court offices recording these sums and paying them out to wives. Many courts have an annual turnover of several thousand pounds a year, and office hours are arranged to suit the convenience of those attending to pay or be

cannot be carried out until there has been some rebuilding. The juvenile courts are organised on a special basis.

12 Cmd. 6507, 1944, paras. 96 and 97.

13 Cmd. 6507, paras. 96 and 100.

14 Justices' Clerks Committee Report, Cmd. 6507, paras. 51–54.

15 Report of the Committee on Legal Aid and Legal Advice in England and Wales, Cmd. 6641, 1945.

paid. The dispersal of people during the war has resulted in a great increase of payments by post instead of personal attendance; the cost of postage falls on the payors and payees, but with higher wages and higher payments this accounts for a smaller proportion of payments, and the post can be regarded as a normal method for those who cannot or do not want to attend personally. For the future, we should be able to consider the hearing of applications and cases as the determining factor in the sites for court-houses.

(2) In county divisions one court-house must serve several villages, and in selecting a place the chief consideration should be accessibility. In some areas public transport all comes into a centre like the spokes of a wheel, and it is easier for most local people to travel say ten miles into the centre than five miles round the rim. Further, most people can make some additional use of a visit to a centre. A substantial number of persons attending court are not local people, but motor drivers and witnesses who may live at a distance.

(3) There are advantages in a number of petty sessional divisions holding their courts in the same building in a centre. A good court-house should include: (a) at least two types of court-room, one for ordinary cases, and the other for the juvenile court, and preferably a third for the domestic court; (b) adequate accommodation for the justices' room, rooms or cells for prisoners, public waiting rooms, rooms for solicitors, probation officers, and offices for the clerk and his staff and probation administration. There are some modern court-houses that fulfil these requirements, but the ordinary run of court-houses is bad.[16] Many are merely rooms in police stations. Waiting and consultations must take place in corridors or in the yard. There are no books except *Stone*. It would not be economic to provide proper accommodation unless it is in frequent use, and that can be secured only by reorganisation. This does not mean that all the work would be transferred to the local centre. There is no reason why magistrates should not sit in outlying places to hear applications, but summonses granted would be made returnable at the central court-house unless it

[16] They fall below the standard of other public buildings. There are also some special points. Most people attending court are nervous and ample lavatory accommodation should be provided. Another fine point of court construction is the acoustics, which are often so bad that in new courts they have been made perfect, which is tiresome, as a solicitor cannot whisper to his client, nor one magistrate to another, without the risk of being heard all over the court.

appeared that there were good reasons for hearing the case at the outlying court-house.

(4) It is likely that in future a large proportion of cases in magistrates' courts will be taken by solicitors, partly through a greater use of solicitors by the police, prosecutions by local and central government as a consequence of controls and collectivist policy, and partly through better facilities for legal aid.[17] A local central court-house makes it easier, and hence cheaper, for solicitors to attend.

(5) It is a great convenience to have two or more courts sitting simultaneously. If a place has sufficient business to require say six courts a week, it is generally better to have two courts on each of three days, or even three courts on two days, rather than a daily court. It reduces the waiting about, facilitates a fixed time for an important case, and avoids the nuisance of one case unexpectedly holding up the disposal of the rest of the list. It is a little more expensive on the administrative side, but it is a definite saving of time and irritation to the public, police and solicitors.

A reorganisation of magistrates' courts on the lines of central local courts, probably with outlying sittings for applications and some other purposes, would not, of course, alter the total volume of work. It is not possible on the information available to say how many stipendiaries would be needed to replace lay justices on their present organisation. On a reorganised system it is by no means clear that the reduction in the number of courts would make it easier to man them by stipendiaries, for any extension of the desirable practice of holding two or more courts simultaneously would be difficult without the lay justices. Probably the number of stipendiaries required would be much the same under the reorganised system as under the present system. The Lord Chancellor (Lord Jowitt) said at the Magistrates' Association meeting in October, 1945, that replacement of the lay justices would require four or five hundred stipendiaries; I should hazard the guess that more would be needed.

It must be remembered that a stipendiary is not likely on the average to hold more than four courts a week and may well hold less. The most recent figures available show that in 1941 the metropolitan magistrates averaged 170 days a year.[18] In

[17] The Rushcliffe Report, note (15) above, recommends, *inter alia*, that legal aid should be available for both parties to civil matters before magistrates.
[18] Hansard for 9th Oct., 1941, col. 1120.

1935 the King's Bench Division Judges averaged 172 days of sitting, the figures for the following three years being 149, 161, 203, which gives an average for the four pre-war years of 171.[19] Summary jurisdiction is irritating work. In fact, one of the weak points of paid magistrates is that few men have the ability to remain good tempered and patient when they take courts day after day. The sheer boredom of much of the work sooner or later produces foolish remarks, and if the particular magistrate is not on good terms with the press his momentary lapse gets much publicity. Something of the same problem arises with divorce work, and the present policy appears to be to assign new judges to that work and then to send them to other divisions as occasion offers. The stipendiary will go on being a stipendiary until he retires or dies, and any attempt to step up his output is fatal to its quality.

The substitution of stipendiaries for lay justices would raise the question of the personnel of the many special tribunals created by recent legislation, for much of their work is akin to that of the justices or that of the county courts. If we are to continue to draw our lesser judges from practising barristers we should need a larger bar than at present to supply candidates for appointments, and it is difficult to see how a much larger bar could consist of practising rather than briefless barristers. It would probably be necessary to open these appointments to solicitors. The tendency would be for the lower judiciary to become a profession, appointed from youngish men who had obtained legal qualifications with the intention of securing such appointments.

But the choice for the future does not rest merely between retention of the present system and the universal use of stipendiaries. Several times in the history of our law we have been able to alter various features of an institution so that it has retained its main outline but has been revitalised and adapted to changing conditions. Three main things are required for this. The law as to stipendiaries should be reviewed, a better general standard of lay justices is required, and reforms are needed in the system of justices' clerks.

It is not clear what is the correct deduction to be drawn from the fact that so few towns have applied to have stipendiaries. Dr. Hanbury regards it as a 'testimonial of the

[19] Table XV of the *Civil Judicial Statistics* gives the number of days of sitting of the divisions of the High Court.

efficiency of the lay justices', upon which Lord Chorley comments that 'economy would be nearer the mark'.[20] It is certainly tempting to think that a borough would be unwilling to provide a salary for a service that lay justices will do for nothing, but the experience with recorders does not support this view. There are a number of small boroughs with separate courts of quarter sessions where there are very few cases for trial and often none at all,[21] yet these boroughs do not seem to mind going on paying to have a recorder and a borough clerk of the peace. Any borough with less than 10,000 population on the 1881 census can petition for the revocation of its separate quarter sessions, which would lead to the work being done at county sessions, at the cost of the county, but I have not come across any instance of this economy being sought. All this shows is that borough councils are not entirely 'economic man'. It is, however, obviously open to question whether a borough council is the most appropriate body to decide whether a stipendiary is needed and whether salaries should be a local charge. A recent inquiry has shown the need for considering the principles on which work should be allocated as between a stipendiary and lay justices.[22] The standard of the lay justices depends primarily on the method of selecting persons for appointment and the removal of 'dead wood'. A Royal Commission is not infallible either in diagnosis or prescription for social ills, but it is the best method the English have discovered for getting reforms in the machinery of justice. It is too often forgotten that when during last century England carried through remarkable changes in the legal system the legislative and administrative reforms were based on careful inquiry by Commissions. To the gibe that a Commission postpones action for a number of years, I would reply that without the report of a Commission we generally have to wait much longer.

The problem of justices' clerks has been the subject of a Departmental Committee,[23] and some account of the recommendations has been given in this *Review*.[24] The Report of that Committee has been well received. One criticism that is relevant here has been made about the position of the clerk. The argument takes this form: at present, it is said, the clerk

[20] 8 MOD.L.REV. 85.
[21] The business of each court is given in Table VI of the annual *Criminal Statistics*.
[22] Procedure at a case heard before two justices at Longton, Stoke-on-Trent; Report of an inquiry by Lord Goddard (1945).
[23] Cmd. 6507, 1944.
[24] Chorley, 8 MOD.L.REV. 9 *et seq.*

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is often the dominating force in the court, and if justices clerks become better specialists and more professionalised they will be still more dominant. There is no doubt that in some courts the clerk takes too much upon himself, but the pith of the matter is that unsatisfactory clerks and poor justices commonly go together. A good clerk—and the good ones are very good indeed—generally has a good bench. A general improvement in justices and clerks is the only remedy, but attention to some points of detail may help.

Criticism of the clerk's conduct in court is involved with questions of procedure, and I cannot go into that in this paper. It is the clerk retiring with the justices that annoys many people, particularly lawyers. It is said that the clerk tells the justices what their decision should be and what the penalty should be. Like many statements made about magistrates' courts, it may be true of some courts and certainly is not true of others. I know a considerable number of justices' clerks who would regard such a statement as a libel on them in their professional capacity. A justices' clerk who knows his job will not seek to retire with the justices unless he is asked to do so; he will then confine his advice to legal points. Justices who have not learned much about their duties do ask clerks for their opinion on matters of fact, or about previous convictions, or other things that should not be mentioned; a good clerk educates his justices by explaining to them what are their duties and what are his. In addition to legal advice, the clerk may be called upon to refresh the memory of the justices on some point of evidence by consulting the note made in court. As to the penalty to be imposed in a particular case, the most that the clerk should do is to say, if he is asked, what penalties have been imposed by other benches for a similar offence. With justices sitting on rotas it is desirable that some uniformity of sentences should be observed.[25]

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My own view is, that the advice given by clerks when the justices retire could be given in open court; it might take up more time and be rather a nuisance, but if it would lead to greater trust in the courts it would be worth trying. Often the only reason for consulting the clerk is as to the maximum penalty and the complications of driving licence disqualification and endorsement. Uniformity as between different rotas can

[25] This, of course, applies only to lesser offences where fines are imposed, and it does not imply a rigid scale. Local papers are soon commenting if lampless cyclists have to pay 5s. on Tuesdays and 10s. on Thursdays.

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be secured by periodical discussion between the justices or chairmen of rotas. When a Rule Committee is set up for summary jurisdiction [26] it might be as well to draft its powers so that rules could be made on the way in which the justices consult their clerks, and then, if the broader processes of improvement do not appear sufficient it would be possible to try detailed regulation. But ultimately you always come back to the people who work a system—the kind of people they are, and their training, and their will to act fairly and properly.

R. M. JACKSON.

[26] Recommended by the Justices' Clerks Committee, Cmd. 6507, paras. 220–229.

REFRESHER EDUCATION FOR LAWYER VETERANS

I

THE bar of the common law world has given largely to the cause of the United Nations. Quite apart from the contributions to our common victory of lawyers in Government service and war industry on both sides of the Atlantic, many thousands of men and women of our profession have served in uniform from Newfoundland to the Siegfried Line and from Singapore to Okinawa. More than 25,000 lawyers and almost as many law students have served in the American armed forces, mostly in the combat branches.[1] They have been deck officers and seamen in the Navy and Coast Guard, they have commanded infantry or artillery or tanks or served in the ranks in the Army and Marine Corps. They have not, for the most part, been serving as lawyers, but as fighting soldiers and sailors and marines.

Now they are coming back, their immediate job done, most of them anxious to return to the practice of their chosen profession. And they are at a disadvantage. For that matter, all veterans are at a disadvantage in an unstable post-war economy. Our veterans have lost time; they have lost training; they have lost civilian experience and contacts. Their war experience is mostly not an asset in the business world or in the professions. Even the doctors, who have been exercising their professional skills in the service, are at a disadvantage compared with their professional brethren who have stayed at home.[2] They have lost patients, while their Army experience has not been such in most cases as to perfect them in the arts of civilian medicine.[3] With the lawyers, the case is even worse. For most of them, the law has been a closed book for three or four or five years, save perhaps for an occasional reluctant glance into the Manual for Courts

[1] See *Hearings before a Sub-committee of the Committee on Finance, U. S. Senate, on H. R. 3749* (1945) 139 (lawyers in the armed forces); Wicker, *Legal Education Today and in the Post-War Era*, 18 Tenn.L.Rev. 700, 701 (1945) (law students).

[2] On the needs of veterans of the medical profession for refresher education, see N. Y. Times, Oct. 14, 1945, p. 32.

[3] If I may be pardoned a personal anecdote, my battalion surgeon while I was commanding a Field Artillery battalion had been a gynæcologist in civilian practice.

Martial. They have lost clients and the opportunity to get clients. Their professional skills have become rusty, and those of them who went directly from law school to training camps have lost their normal apprenticeship at the bar. The least these men and women have the right to expect is that their re-establishment in practice be facilitated by effective and readily available means and at the expense of the Government for which they have cheerfully sacrificed their years spent in uniform.

The problem is of course not peculiarly American in any sense. It has been recognised and solved with considerable success in Canada, Australia and New Zealand, and will no doubt be adequately met in England. But some account of the experience of the American bar and law schools in dealing with this situation may be of interest to lawyers, and especially to lawyer veterans in England and elsewhere in the common law world.

II

THE problem in the United States is complicated, by reason of the fact that there are forty-nine distinct American legal systems, one for each State and one for the District of Columbia. There is no single final Court of Appeal, like the House of Lords for England and the Judicial Committee of the Privy Council for the Dominions on most matters.[4] To be sure, these forty-nine systems are rather similar, but they differ widely in detail as to matters of common law, and even more as to matters of legislation. There is more similarity, indeed, between the law of New York and the law of England than there is between the law of New York and the law of Louisiana or Texas.[5] The differences are much greater than those between the law of the Canadian Provinces or of the Australian States, since there the common law basis is at least in theory identical throughout Dominion and Commonwealth. On the other hand, as in Australia and Canada, there is a substantial amount of law which is wholly Federal and hence common to all of the United States.[6] The establishing of adequate refresher instruction for American lawyers, therefore, requires the careful

[4] Special limitations on appeals to the Judicial Committee from Eire and in constitutional cases from Australia are, of course, unimportant in this connection.

[5] Cf. my *English Law in the Making*, 4 MOD.L.REV. at 121 (1940).

[6] This is true not only of the law of the United States Constitution and of Federal taxation, but also of Patent Law and much of Administrative Law and Labour Law.

tailoring of the courses offered to local situations throughout a large and legally diverse country.

There are cognate problems which arise from the size and variety of the American legal scene. While the American bar does not have the barrister-solicitor differentiation, it does have much specialisation, especially in the larger cities. Trial lawyers, tax lawyers, corporation lawyers, patent lawyers, real estate lawyers, labour lawyers, divorce lawyers—all tend to be specialists. On the other hand, in the smaller communities, the lawyer must be something of a jack-of-all-trades. He is the family lawyer, the small business man's lawyer, the farmer's lawyer, and usually is an important political and civil force, whether interested in public office or not.[7] He needs to know more law in more fields than his metropolitan brethren of the bar, and in some fields, especially trial practice, he usually does, although he has less opportunity for systematic law study after his admission to the bar. The 'country lawyer' is just as much an American institution as the family doctor, or as the family solicitor in England. But he is quite a different proposition from the corporation lawyer of Wall Street or salaried legal representatives of General Motors.

An adequate system of refresher education in the United States must provide for local instruction in State law as well as for specialised instruction for many types of legal specialists, and must make such instruction available not merely in the big cities but throughout the smaller communities of the country.[8] Merely to state the problem is to indicate its magnitude. What can be done, and what has been done, to solve it? That is the question sought to be answered in this article, for such use as the answer may be to the legal profession in the rest of the common law world and in the other United Nations.

The problem is both educational and organisational. It is not alone necessary to determine what sort of refresher instruction is wanted and needed by lawyers returning from service with the armed forces, although this is difficult enough,[9] but

[7] For an entertaining account of the life and activities of a lawyer in a small American community, see Partridge, *Country Lawyer* (1939).

[8] While exact figures are not available, it seems probable that not over 35 per cent. of American lawyer veterans will return to practice in cities of 250,000 or more population, of which there were thirty-seven in the United States in 1940.

[9] For differing views on this subject, see Cheatham, *Post-War Legal Education and Service Men*, 19 Ind.L.J. 330 (1944); Wicker, *Legal Education Today and in the Post-War Era*, 18 Tenn.L.Rev. 700, 705 (1945). Compare the discussion of the subject in *Association of American Law Schools Handbook* (1944) 57–72, 215–227. Cf. my testimony before the Senate Sub-committee on Veterans' Legislation, in *Hearings before a Sub-committee of the Committee on Finance, U. S. Senate, on H. R. 3749* (1945) 134–148.

it is essential to make the needed educational facilities available at the times and places they are wanted, and throughout the forty-eight States so far as possible.[10] Obviously, the problem is a national one, although requiring the widest local co-operation, and it is on this basis that the American bar has sought to solve the organisational problem. To understand the reasons for the solution attempted, it is necessary first to know the forms in which the legal profession of the United States is organised, and to consider the part which the American law schools can and will play in the implementing of a national veterans' refresher programme.

III

THE most important professional association of lawyers in the United States is the American Bar Association.[11] It has some 32,000 members, and has rendered significant service in improving the quality of American legal education and raising standards for admission to the bar.[12] It does not, however, include all American lawyers, nor is it a federation of the forty-eight State bar associations, each of which is separately organised; nor does it include in its membership the numerous local bar associations throughout the country.[13] In the American Medical Association, for example, a physician or surgeon by becoming a member of his local medical association automatically becomes a member of his State association and thus of the American Medical Association. But although a lawyer in New York City, for example, may belong to the New York County Lawyers' Association, the Association of the Bar of the City of New York, the New York State Bar Association, and the American Bar Association, as well as others,[14] he must join each separately and pay dues to each. But the American Bar Association, although not inclusive of State and local bar

[10] Cf. *Lawyer Veterans Look to the Bar for Refresher Programs*, 31 A.B.A.J. 461 (1945).

[11] Until 1937 the American Bar Association, organised in 1878, was the only national lawyers' organisation except for specialised groups, as, for example, the Federal Bar Association, the Association of Practitioners before the Interstate Commerce Commission, and the like. In 1940 its membership included 17.8 per cent. of the lawyers of the United States. The National Lawyers Guild, organised in 1937, had 3,774 members in 1938, the latest published figure. See Brown, *Lawyers and the Promotion of Justice* (1938) 149. This was approximately 2.2 per cent. of the lawyers in the United States.

[12] See Brown, *Lawyers and the Promotion of Justice* (1938) 45–50, 134–141.

[13] There are 137 city bar associations and 637 county and regional associations in the United States.

[14] As, for example, the Veterans' Bar Association and other special bar groups, as well as the New York Chapter of the National Lawyers' Guild.

associations nor of all American lawyers, is the most representative national bar organisation, and the obvious organisation to take the lead in any national plan of refresher training for lawyer veterans, working through the State and city bar organisations.

In twenty-five of the United States, all the lawyers in the State are organised as a State bar, membership in which is compulsory.[15] This plan of a unified or integrated bar, which may be likened to the Inns of Court and Law Society combined into one, has made substantial headway in America since it was first tried in North Dakota in 1921.[16] Where an integrated bar exists, it may itself become active in veterans' refresher activities, as, for example, with the State Bar of California,[17] or it may leave the matter to the local bar associations or to the law schools. Local associations, in turn, may be large and well organised, as in most of the larger cities, with substantial funds and a paid permanent staff, or may be small, impecunious and often inactive, as in many rural counties. There are no integrated or unified local bar organisations of the inclusive type. Some local bar associations are active in veterans' refresher work, as for example, the Chicago Bar Association; others are not.

There are ninety-four law schools in the United States which are members of the Association of American Law Schools, and fifteen others which have, though not members of that Association, been approved by the Section of Legal Education and Admissions to the Bar of the American Association.[18] In the academic year 1940–1941, prior to Pearl Harbour, these schools had over 28,000 students. After the United States was in the war, law school enrolments dropped sharply to 4,800 in 1943, as students and prospective students entered the armed forces or other war service, as did many faculty members.[19] But with demobilisation, enrolments have risen rapidly, with every indication that the pre-war figure will be greatly exceeded by

[15] See *West Virginia State Bar Puts Integrated States in Majority*, 28 J.Am. JudicatureSoc. 165 (1945). The most populous States, however, with the exception of California, do not have integrated bars. About 36 per cent. of American lawyers practice in States having bar integration.

[16] See Essery, *Bar Integration*, 19 J.Am.JudicatureSoc. 175, 177–180 (1936).

[17] Mathes, *Refresher Courses for California Lawyer Veterans* (May-June, 1945) 20 J.S.B.Calif. 116.

[18] The Association of American Law Schools, while an organisation of educational institutions and not of individual law teachers, actually serves many of the same professional functions as the Society of Public Teachers of Law.

[19] See Wicker, *Legal Education Today and in the Post-War Era*, 18 Tenn.L.Rev. 700, 701 (1945).

1946.[20] Most American law schools will have their hands full in coping with this increased enrolment, and some will therefore be unable to participate in any plans for refresher instruction for returning veterans who have already completed their law school courses. Such participation is most probable in the case of the State university law schools, which in many States have very close relation with the bar.

IV

IN this setting, the American Bar has sought to work out a flexible national plan for the co-ordination and mobilisation of local resources to provide adequate refresher instruction to its returning lawyers who have served in the war. This plan has been developed for the Section of Legal Education of the American Bar Association by the Practising Law Institute,[21] which for twelve years has been engaged in giving practical courses for lawyers in New York City,[22] and in 1943 extended its activities on a national basis.[23] The plan developed by the Institute and made available to the State and local bar associations, and to the law schools, is designed to furnish the maximum assistance to them in the presentation of adequate refresher courses for lawyer veterans in each of the United States. The plan contemplates a series of courses designed rapidly to refit lawyers for practice, using materials to be supplied centrally, so far as practicable, where desired. It involves four recommended refresher courses.

1. *State law and procedure.* Most returning veterans want to regain the 'feel' of their profession. The man who has 'forgotten all the law I ever knew' wants to start again to think and talk like a lawyer. Although some veterans believe they want lengthy reviews of the law they learned in law

[20] Increased enrolments are greatly encouraged by the circumstance that veterans can attend school largely at Government expense under the Servicemen's Readjustment Act of 1944, Public Law No. 346, 78th Congress, 2nd Session.

[21] The Practising Law Institute is a non-profit educational institution approved by the New York State Department of Education as a post-graduate school. Its president is former Under Secretary of the Treasury Arthur A. Ballantine, and its board of trustees includes Secretary of War Robert P. Patterson, Assistant Secretary of the Navy H. Struve Hensel, Judge Thomas D. Thacher of the New York Court of Appeals, formerly Solicitor-General of the United States, and Dean Young B. Smith of the Law School of Columbia University. Its founder and present director is Harold P. Seligson, Esq., of the New York Bar.

[22] These have for the most part been evening courses and clinics given by prominent practising lawyers, but there have also been several full-time summer sessions which have been attended by lawyers from all over the United States.

[23] Since November, 1943, courses on Federal Taxation have been organised in thirty-eight cities in twenty-four States.

school, and although some law schools seem disposed to encourage that idea by offering long review courses,[24] the national plan proceeds on the theory that a rather brief review of substantive and adjective law will be sufficient, especially if concentrated on the immediately practical objective of studying the peculiarities of the veterans' State law and procedure against a general common law background. Only a few veterans need to relearn their law; for these, long courses may be a help, although it may be doubted whether even such courses will help them much to become ornaments of the bar. But with most, it is like remembering how to ride a bicycle; all that is needed is a little practice, and the old skill comes back.

The type of review course contemplated is not unlike the bar review courses common in the United States before the war—brief lecture courses taken by law school graduates in preparation for State bar examinations. In most States, veterans who have finished law school, but were not admitted to the bar before entering the armed services, must still take bar examinations; for them such a course is almost a necessity. But even in States like New York, which waive bar examinations for veterans under such circumstances, such a course is the best possible initial review, and will, in most instances, render unnecessary and undesired any further detailed review of substantive and adjective law as such.

These courses in State law and procedure must be organised locally, with local lecturers from the State bench or bar or law schools, and this is being done in a considerable number of larger cities in various States.[25] For the benefit of those organising such courses, a brief text-book on New York law and procedure, prepared especially for such refresher courses in New York State, is being made available to bar associations and law schools in other States as a possible pilot model.[26]

2. *General and trial practice.* Returning lawyer veterans need and want more than a brief review of 'law-school law'. Most of them have missed their apprenticeship. Thousands

[24] For example, the Law School of St. John's University, Brooklyn, N.Y., is offering a twenty-four-week refresher course of 228 lecture-hours, which attempts to reteach substantially all the subjects of a normal law school course. This is, perhaps, an extreme example.

[25] For example, Boston, Mass., and Chicago, Ill.

[26] This volume, Medina, *Summary of New York Law and Procedure*, will be published early in 1946. Its author, a practising lawyer of distinction, for years conducted one of the most successful bar review courses in the United States, and was at one time Professor of Law at the Law School of Columbia University.

have gone directly from law school or bar examination into uniform. And even those who had some experience in practice prior to entering the service have become rusty in the lawyer's art. American legal education has not been directed toward producing practising lawyers, but rather to giving adequate academic training for learning the arts of practice by experience in practice. For the lawyer veterans of this war, that experience has been denied or postponed or forgotten. The need is for a method of supplying the practical knowledge required for effective practice as expeditiously and completely as possible without additional wasted years. It is a problem of teaching, not law, but how lawyers do things.

American lawyers do two main sorts of things—they advise clients and conduct office practice, and they try cases. They are both solicitors and barristers. Both of these practical sides of the profession can be taught, although not in university law schools or by law school methods.[27] This has been proved by twelve years' experience with practical post-admission courses for lawyers given by the Practising Law Institute in New York City. The problem is how to make this teaching technique available throughout the United States.

Fortunately, differences in State law are relatively unimportant in this practical field. A witness is cross-examined or a negligence case prepared for trial in much the same way in Texas and Ohio as in New York. The practical problems of how to organise a corporation for a particular business purpose are not greatly variant in the several States, although the corporation statutes involved may differ. This makes it possible to prepare short practical handbooks by practising lawyers expert in each of these subjects, which can readily be used as text-books and as the basis for lectures in each State by local practitioners, who can illustrate the principles involved by examples and, at the same time, point out particular variants in the State practice. Such a series of handbooks is now in preparation, covering the fields of General Practice (advising clients and office practice)[28] and Trial Practice, including preparation for trial, the trial itself, and trials in particular actions,[29] and will be ready for use early in 1946.[30]

[27] Cf. my article, *The Function of the University Law School*, 49 Harv.L.Rev. 1068 (1937).

[28] This series will include such topics as corporate practice, brief-writing, drawing leases, preparing contracts, collecting claims, labour law practice, copyright practice, patent law, and other general practice subjects.

[29] This series will cover all the steps in civil litigation from the first interview

When these handbooks are available, lecture courses by local lawyers, judges or law teachers in the several States can readily be organised. These may be given under bar association auspices, or by State law schools, or in any other way desired in the particular State.

3. *Federal taxation.* No American lawyer can avoid the responsibility of securing and keeping up a working knowledge of the Federal tax laws. This was true before the war, and with the Federal income tax still taking large toll of even small incomes,[31] it is even more true to-day. Moreover, the tax laws of the United States are not crystallised or static. In particular, the period from 1940 to 1945 has seen extensive changes, so that a lawyer who entered the Army or Navy in 1941 or 1942 to be demobilised in 1945 or 1946 simply does not know his Federal tax law. For that matter, lawyers who have remained in practice during this period have had continually to keep up with recent statutory changes and judicial and administrative interpretations in this field.[32]

This subject, unlike State law and procedure, and even to some extent general and trial practice, does not differ from State to State.[33] A series of handbooks or a panel of lecturers suitable for Massachusetts or New York is equally suitable for Georgia or Missouri. The subject is, moreover, a practical one, and the needs of lawyers in general practice can best be met by practical handbooks written by practising tax attorneys specially for that purpose. This has been done. A series of handbooks on Fundamentals of Federal Taxation, already published and now undergoing revision, meets the need for a first course[34]; a series on Current Problems in Federal Taxation, now almost completed, gives a more advanced treatment.[35] Lecture courses based on these handbooks are now being given

with the client to final judgment in Court. The editor for this series is Harry Sabbath Bodin, Esq., of the New York Bar.

[30] The general editor for both series is Dean Roscoe Pound, University Professor in Harvard University, and formerly Dean and Carter Professor of Jurisprudence in the Harvard Law School, and for many years engaged in active practice in the State of Nebraska as well as an Appellate Judge in that State.

[31] The toll is moderate enough, however, by English standards.

[32] This is evidenced by the fact that some 14,000 American lawyers have subscribed to the Practising Law Institute's handbooks on Federal taxation.

[33] To a certain extent, Federal taxation may be affected by the State law, as in the so-called 'community property States', but this is the exception.

[34] The editor of this series is Professor Erwin N. Griswold of the Harvard Law School.

[35] The editorial committee for this series consists of Professor Griswold; Roswell Magill, Esq., formerly Professor of Law at the Law School of Columbia University and Under Secretary of the Treasury; Harold P. Seligson, Esq., director of the Practising Law Institute; and Weston Vernon, Jr., Esq., vice-chairman of the Section of Taxation of the American Bar Association.

wherever desired by bar associations throughout the United States,[36] and serve the needs not only of veterans and of lawyers who have been away from private practice in Government service during the war years, but also those of lawyers whose practice has not been interrupted but who must keep up with current developments in Federal tax law.

4. *Significant developments in the law during the war years.* In the United States, as in England, the war years have seen important changes in the law. Some of these have been purely war-time phenomena, like man-power control and much of rationing; others have been of permanent significance. This has been particularly true in the fields of Administrative Law and Labour Law, but no subject in the *Corpus Juris* has stood wholly still. Some of these developments have been statutory, some have been in the fields of constitutional law, some have taken place in the classical common law fields. There has not been in the United States anything comparable to the *Annual Survey of English Law* to give a summary view of these devolopments, although such an annual survey is now promised.[37]

The real need from the standpoint of the lawyer veteran is a review of significant developments in the law since 1940, written by the leading scholars in each legal field, following the general lines of articles on the progress of the law in various subjects which have from time to time appeared in American legal periodicals.[38] Such a volume is now in preparation under the editorial supervision of a committee of the Association of American Law Schools,[39] and will appear early in 1946.[40]

These volumes, when they appear, will be suitable for use either for individual study, or for instruction by extension methods, or for use in connection with lectures on State law and procedure as forming a background for the local law.[41]

[36] Such courses are now in progress in Atlanta, Ga., Boston, Mass., and St. Louis, Mo., and are about to begin in Atlantic City, N.J., Dallas, Tex., and Los Angeles, Calif.

[37] An *Annual Survey of American Law* for each of the years 1942, 1943 and 1944, is about to appear under the imprimatur of the Law School of New York University, having been prepared by members of the faculty of that institution.

[38] The earliest article of this sort appears to have been Pound, *Progress of the Law, 1918–1919—Equity*, 33 Harv.L.Rev. 420 (1920). The Semi-centennial volume of the Harvard Law Review contained a series of fifty-year reviews of various subjects. See, for example, my *Fifty Years of American Equity*, 50 Harv.L.Rev. 171 (1936).

[39] The chairman of this committee and editor of the collection is Dean F. D. G. Ribble, of the Department of Law of the University of Virginia.

[40] The volume is being published for the Association of American Law Schools by the Practising Law Institute.

[41] In addition, there is need for special and more elaborate surveys of particularly

V

THIS plan of refresher studies, if pursued to its conclusion, should prepare any lawyer veteran who has had a reasonably good law school education to undertake the practice of his profession with some degree of confidence. He (or she) will no longer feel rusty, or ill at ease with the law. The question remains—How is this plan to be carried out practically?

There are three groups of students to be considered. First, there are those who are employed or practising for themselves in the larger cities. These can be best aided by night lecture courses and clinics of the sort already described. Second, there are lawyer veterans not yet employed or practising who can come to the larger cities for short, intensive refresher courses. These can be best aided by the same type of instruction, but preferably given several hours a day and in day classes. Third, there are the lawyer veterans who have resumed practice in the smaller communities or who, although not yet re-established in practice, are unable for financial or family reasons to attend refresher courses given in the larger cities. This last group is the most numerous, since the typical lawyer in the United States as a whole is still not the corporation lawyer of Wall Street but the country lawyer of the Middle West, South and West.[42]

The problem of refresher courses for lawyers who cannot attend lectures in the larger cities can be solved to some extent by the development of extension instruction. Correspondence teaching of law has heretofore been held in very low esteem in the United States. During the war, such instruction in other subjects was effectively developed by the Armed Forces Institute, but the teaching of law to men and women in the services was not attempted, as it was, and very successfully, by the law schools of Australia and New Zealand.[43] But it must now be attempted, and there is no reason why the attempt should not be successful.

To be sure, some legal subjects lend themselves better than others to extension teaching. Federal taxation, particularly, should be an easy subject to deal with effectively in this way. The same thing may be said of those aspects of general practice

active fields of legal development, such as Administrative Law, Constitutional Law and Labour Law.

[42] See note 8, *supra*.

[43] Communicated by Lt.-Col. Julius Stone, Challis Professor of International Law and Jurisprudence in the University of Sydney, Australia, sometime Dean of the Faculty of Law of the University of Auckland, New Zealand.

which involve mainly paperwork, such as the drawing of contracts, leases, incorporation papers, and the like. It will be more difficult to teach trial practice in this way, but even here preparation for trial, the drawing of pleadings and motion papers, and the drafting of other documents incident to trial should be readily teachable by extension methods, while even correspondence instruction in how to examine a witness may well be preferable to no instruction at all.

There is still another possibilty. The very aspects of trial practice most difficult to teach by correspondence should be easy to teach by educational films. These were used with great success by the American Army and Navy, even in the legal subjects [44], and yet the development of audiovisual instructional aids, although greatly advanced during the war, is still in its initial stages. The whole matter of using sound films in professional education is now being actively explored in the United States, and it is to be hoped that funds can be found to finance a really significant programme in the field of legal education.[45] If this can be done in time, the task of bringing effective refresher instruction to lawyer veterans outside the big cities will have been largely solved.

VI

THE educational programme which has been outlined in this article will be financed mainly under the provisions of the Servicemen's Readjustment Act of 1944 [46] as amended,[47] commonly known as the G.I. Bill of Rights.[48] The significant features of this Act for present purposes are contained in Title II, which provides for payment by the United States Veterans' Administration of tuition for short, intensive courses of less than thirty weeks' duration and for correspondence courses, on the basis of contracts made by the Administrator, with approved educational institutions on such terms as shall be reasonable and fair. While the Act may be deemed defective in not providing adequate subsistence and travel allowances for

[44] Special reference may be made to the Army films on 'Courts Martial' and 'The Articles of War'.

[45] The principal difficulty with development of film programmes is the cost, which may run as high as £5,000 for one thirty-minute film.

[46] Public Law No. 346, 78th Congress, 2nd Session, approved June 22, 1944.

[47] By Public Law No. 268, 79th Congress, 1st Session, approved December 28, 1945.

[48] This legislation relates to numerous matters other than veterans' education, as for example, hospitalisation and claims (Title I), home, farm and business loans to veterans (Title III), employment of veterans (Title IV), and unemployment allowances (Title VI).

veterans taking short refresher courses at a distance from their homes, and in not permitting payment for books for home study without formal instruction in residence or by correspondence,[19] it will permit reasonably adequate refresher instruction not only for lawyer veterans but for all men and women who have served in the armed forces, and who desire to return to their former professions or vocations. The problem of the American bar now is to make the requisite educational opportunities generally available to lawyer veterans. This can be done, and can be done only, by the whole-hearted voluntary co-operation of the bar and law schools in implementing the national plan which the American Bar Association is sponsoring, and which the Practising Law Institute is seeking to administer.

The organisation of adequate educational facilities for returning lawyer veterans is the responsibility of the bar, just as the payment for such educational opportunities is the responsibility of the Government. The men and women who have fought for us on the land, on the sea and in the air, are entitled to this aid in their rapid and effective re-establishment in the profession from which they have been absent awhile to serve their country in its hour of need. The American bar is endeavouring to discharge its responsibility to its war veterans in a manner worthy of a great profession.

SIDNEY POST SIMPSON.*

[19] See my testimony before the Senate Sub-committee on Veterans' Legislation on behalf of the Section of Legal Education of the American Bar Association, the National Lawyers' Guild, the American Medical Association and the American Institute of Accountants, October 9, 1945, reported in *Hearings before a Sub-committee of the Committee on Finance, U. S. Senate, on H. R. 3749* (1945) 134–148.

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LAW-MAKING IN WHITEHALL

No subject has so much engaged the attention of English lawyers, both the jurists and the practical variety, during the past generation as that of the relationship of the newly fashioned executive towards the Legislature on the one hand and the Courts on the other. Judges have thundered from the bench against the ' advancing tide of bureaucracy ', and one of them, no less than a Lord Chief Justice, has descended into the arena where his efforts redounded so little to his credit [1] that one was tempted to renew allegiance to the old rule that judges should not write books about law. Several of the most-discussed volumes of the inter-war years dealt with this topic, which has become even more burning during the years of the war.

The complexion of English Constitutional Law has been very much coloured by the events of the seventeenth century when the legislature triumphed over the executive which then had the judiciary very much in its pocket. This triumph was not, of course, really a triumph of the legislature but of those social forces, surgent in the mercantile community and its allies, which were then expressing themselves through the legislature. During the following century this class, in co-operation with the great Whig landowners, was able to achieve a remarkable series of successes against foreign powers ostensibly much better equipped in the sphere of government. Remarkable because the classes triumphant in this political and social revolution did not trouble to build up any effective organ of government; contenting themselves with a quasi-independent judiciary largely drawn from their own ranks, and with a rule of thumb governmental machine which nevertheless produced a number of administrators of first-class calibre.[2]

It was possible for a land-owning and mercantile community desiring as little government as possible in the countries where they held sway, and even less on the high seas over which they drew their business, to rub along in this way, though the penalty was paid in such unsuccessful wars as that of American Independence. With the coming of the Industrial Revolution, however, things changed, and though the theory of *laissez-faire*

[1] See *The New Despotism*, by Lord Hewart, 1929.
[2] See *The Structure of Politics at the Accession of George III*, by L. B. Namier.

which was the formulation by a fine thinker of the unconscious philosophy of the mercantile classes was pushed almost to its theoretical limits during the industrial period, the rapidly altering economic and social conditions, and the very needs of the new industrial classes, fast becoming dominant, called almost at once for a much more highly elaborated form of government. The result was the creation of a large number of new departments of State, and, what was of even greater importance, the growth of an entirely new Civil Service.

All this was largely empirical, but while the new governing class in Whitehall was finding its feet, the new social philosophy of industrial England, of which Fabianism may perhaps be taken as a typical leftist example, was beginning to oust *laissez-faire*, and it eventually lingered on only in the dim recesses of the universities. By the turn of the century the Civil Service had awakened to the needs of the new situation, and particularly for a much more powerful and flexible machinery of government; and the public had begun to feel the influence of the new philosophy. The result was the great Liberal administration of 1906–14, which was indeed but a prelude to an era of strong government.

Even in the high summer period of *laissez-faire* a sturdy experimental start with a positive social policy had been made,[3] and something of the necessary executive power had been placed in the hands of the Civil Service. As the technique became better understood the stream of legislation increased in volume, and the powers correlative to it were bestowed upon Whitehall. The requirements of modern war brought out the essential structure of the modern State, which is nothing if not dynamic. From that time there has been no question as to the dominance of the executive in the set-up of present-day England.

This, of course, entailed a diminution in the power and importance of the legislature. Under the earlier system it had been able to give directions to the executive in some detail, but the new executive found that it could not effectively accomplish its task under these conditions, just as had the new monarchy of the Tudors. In order to carry out the new social policy, which it must always be remembered was not the invention of the executive but the demand of the people, it required an elastic authority which would enable it to mould its performances to the working requirements of the policy. The simplest

[3] See H. L. Beale's Hobhouse Lecture, 1945.

solution would have been for the officials concerned to have just got on with the job by doing whatever was needful. Quite apart from the fact that there are obvious dangers in such a course of conduct, the constitutional theory of the dominance of the legislature prevented its implementation, and recourse had to be had to what is called delegated legislation. Under this, as is well known, the legislature sanctions the general scheme of some social programme, prepared by the executive beforehand, and delegates to the department concerned power to take such further legislative action as the requirements of the situation demand. In this way the executive has attained what in reality amounts to wide legislative power, and the theory that the Legislature is dominant has become almost a legal fiction. The American political scientist James Burnham has described the sovereignty of Parliament in England as 'a lingering remnant'[4]; no doubt an exaggerated estimate, but much nearer the truth than the orthodox view. The value of Parliament in the modern world, which is certainly great, is to be found in other directions.

Meanwhile, the legal profession had constructed a formal version of the historical process above described, in which the whole slant is very naturally at a legislative angle. In this picture the high light is the rule of law, depending upon a properly constituted legislature, an independent judiciary, and an executive occupied in the background with a number of essential routine tasks such as arranging for police, armed forces, and the raising of revenue, all under the dominance of the legislature and the control of the Courts. During the eighteenth and into the nineteenth centuries this pretty picture bore some relation to the facts, and during this period it became a sort of ikon to be duly worshipped at all gatherings of lawyers.

That this religion is no longer suitable to the times became clear during the inter-war period to the more acute observers, among whom may be mentioned particularly Dr. W. A. Robson and Mr. W. I. Jennings. Others, such as the late Lord Hewart, began to get that angry, exasperated feeling which comes to the devout when they begin to feel the ground slipping from under their feet. Among the most eminent of this school is Dr. C. K. Allen, formerly Professor of Jurisprudence at Oxford, the home of lost causes. He has for a number of years past been fighting the battle of the classical jurisprudence

[4] See his *Managerial Revolution* (Penguin ed.), p. 128.

in articles, in letters to the *Times*, and in books, notably in *Bureaucracy Triumphant*. His latest and most weighty contribution to the controversy has recently been published and merits careful attention.[5]

The book purports to be 'an inquiry into the nature and scope of delegated legislation and executive powers in England'. Despite Sir Cecil Carr's valuable 'Delegated Legislation' an inquiry of this kind would be very valuable. The trouble about Dr. Allen's book is that it is so thoroughly polemical. The author hates the whole business of legislation by order; fears and despises the 'triumphant bureaucracy'; and venerates the imaginary constitution which Dicey wishfully thought into the pages of his most famous book. This being so, he is no more capable of prosecuting the needful inquiry with impartiality than was, shall we say, Pio Nono of writing an unbiased life of Martin Luther. Dr. Allen is a brilliant controversialist, rejoicing in a witty, lively prose; one reads all that he writes with pleasure, and with profit, too, if one remembers to keep one's head above the waves of eloquent denunciation.

As a controversialist, Dr. Allen's weakness is that he has not got his case clear in his mind before he starts to argue. Up to a point he is aware of what is going on in society; and certainly he realises, and emphasises, that under war conditions vastly increased power must be conferred upon the executive if wars are to be successfully fought. He is therefore a much acuter observer of the contemporary scene than was Lord Hewart. But while he knows that *laissez-faire* is dead he cannot bring himself to bury the body. Much of the argument is accordingly directed against the whole theory of modern government, but a great deal of it admits that such government has come to stay, and concerns itself with how to make it more liberal and less oppressive. But when, after pages of denunciation, the reader suddenly finds himself asked to believe that the author is only concerned with removing blemishes from the fair countenance of a spouse with whom, if he does not exactly adore her, he is content to live, he begins to wonder how genuine it all is.

Dr. Allen has industriously collected for many years past all the examples of badly drafted orders and regulations he could find, all the niggling rules which look so silly if one has no practical acquaintance with the business with which they are concerned, all the examples of official high-handedness which

[5] *Law and Orders*. 1945. London. Stevens. 385 pp. 15s. net.

he has come across. He has treasured them all up with care and not a little glee, and having got a good-sized ammunition dump together he has seized his musket and marched into the fray. He has indeed succeeded in collecting rather a terrifying assembly of bogeys.

The trouble is, that nobody reading this book without some acquaintance with the facts of the matter could possibly appreciate that there are any competently drafted orders, that any regulations have ever been passed which achieved a sensible or, indeed, a necessary objective, and that any government official had ever acted other than in a high-handed and oppressive manner. Indeed, if the picture which is painted in the book were in any real degree representative of the actual state of affairs the governmental machine would long ago have broken down from top-heavy inefficiency; if it had not before that been swept away by a revolution of the outraged and ill-treated citizens, a consummation for which Dr. Allen no doubt prays every day.

But, on reflection, it must be obvious that among the thousands of orders emanating from Whitehall every year some must be open to very serious criticism, especially when produced under the pressing urgency of war conditions, very often by amateur officials 'enlisted for the duration', and in the course of, often groping, attempts to discover what is the best way of handling an exceedingly complex situation. Constructive criticism directed to the improvement of the present position will, I am sure, be welcomed in Whitehall; and Dr. Allen is not without his constructive paragraphs, though they form but a small section of the whole book.

Dr. Allen lays the philosophic basis of his inquiry in his first chapter, entitled 'The Balance of Powers'. Here he founds himself on a 'true' appreciation of Montesquieu, who favoured a 'balance' not a 'separation' of powers between the three elements in the State. When the balance is upset liberty is in a bad way, and if one element monopolises power it is 'lost irretrievably'. According to this theory, when the legislature was dominant liberty should have declined, but actually it increased. Of course the division of powers is, or should be, purely a matter of convenience in a unitary State. Power is there, one and indivisible, and will be allocated in the way which best suits the interest or convenience of the dominant class or groups in society. The experiment with a fixed system of checks and balances in the U.S.A. was due much more to the

need for achieving a *modus vivendi* between the various aggressive and fairly evenly balanced interests then contending for power than to a veneration for a misunderstood British constitution or for the philosophy of Montesquieu, as has sometimes been supposed. It does, however, show the danger of attempting to confine power in watertight compartments.

Dr. Allen's view is that the executive is in danger of securing a monopoly of power, and if it succeeds liberty is lost; his book is, in a sense, concerned with showing how the executive is going about the job of winning this monopoly, with the author as Cassandra. And yet he realises that new conditions require greater power in the executive. His attitude is well exemplified in his statement that ' it cannot be denied, and it need not be denied, that in our system of government the accumulated experience of the executive may have a considerable influence on the shape, if not the actual conception, of legislative policy '. This shows that he is aware of what is going on, but cannot bring himself to look at it squarely. The truth is, of course, as I have already stated, that both the conception and the shape of almost all present-day legislation originates in the departments. In a very wide sense the conception originates with the party programmes on which elections are fought, and which reflect the half-conscious desires of large masses of citizens. But in no real sense do they originate with Parliament. Again, ' the judge has no end to serve except the general dispensation of justice '—statements of this kind made in 1945 make one feel like being rude, they are so very unrealistic.

Having established his point of view Dr. Allen gives us a short history of delegation. The major part of this is concerned with very modern times, and much of it is taken up with the jeremiads of the judges; a quotation will show its spirit: ' In a series of cases, most of which were painful *sequelæ* of the war, the Crown showed a recalcitrance which can only be described as a denial of justice '.

Two chapters entitled ' The Powers That Be ' are concerned with the existing types of delegated legislation, the method of operation and the control of Parliament, *i.e.*, with the legislative power on the one hand, and with the judicial powers on the other, the bodies which exercise them, and how these are controlled, up to a point, by the Courts. Here Dr. Allen is at his best. The build-up of the delegation system has been purely empirical, lack of logic is too painfully evident in many

cases, and a searching analysis brings many weak points to light. Our author is well endowed with the entire apparatus required for the handling of the material, and his lightness of touch brings gaiety to a region otherwise full of gloom. We may, perhaps, be permitted a quotation :—

> He will learn, for example, that it is an offence to play a mouth-organ (' operate any noisy instrument '), or sing exuberantly to the annoyance of less light-hearted passengers, or attach a streamer, balloon or flag to the vehicle, or in an uncontrollable excess of philanthropy, throw coins to be scrambled for by the populace on the footway. And it is not only these improbable kinds of indecorum which may lead to a summons; it would seem that he is equally a criminal if he gives a fellow-passenger a tract (' distribute printed or similar matter of any description '). How fortunate that so few citizens are tempted to these vagaries of misbehaviour.

Among the good points made by Dr. Allen in this part of the discussion is the tendency to evade the ' quarantine ' (the period during which rules have to be laid on the table of the House) by making use of the urgency procedure under which the laying may be dispensed with, and the anomalous position under which statutory rules which have to be published may be amended by ' Provisional Rules which are not necessarily published at all, and may wait a long time for confirmation '. The analysis of the various forms of Parliamentary control is searching, and the illogicality of the present position, under which the type of control exercised seems to depend on the whim of the draftsman, is demonstrated. Dr. Allen thinks that the only satisfactory form of control is by affirmative resolution of the House. This would obviously have the effect of slowing down the whole process, which is no doubt why he advocates it, but unless some new procedure were devised, such as affirmation by a special rules committee, it would obviously be impracticable.

In his chapters on Parliament and the Executive Dr. Allen gets to the heart of his subject. From his point of view the recent history is one long story of betrayal of ancient rights and surrender of privileges. Nevertheless, he should take heart, since he is able to report some successes. The censure passed by the Donoughmore Committee on the well-known ' Henry VIII clause ' has resulted in this clause being virtually dropped from subsequent bills.

Dr. Allen is much exercised by the growing habit of sub-delegation, under which he thinks that responsibility is lost and control rendered more difficult. It must be obvious, however, that in any large department the Minister is only the legislating authority in name, and provided he remains responsible to Parliament it is of very little importance from the point of view of safeguards, and of great convenience from the point of view of administration, to provide him with reasonable powers of sub-delegation. He is on safer ground when he enters a caveat against the growing tendency to give power to a Minister to make such regulations ' as he thinks fit '.

Dr. Allen makes great play with the failure in the Home Office to lay the National Fire Service Regulations before Parliament; an omission which led to the appearance of the Home Secretary before Parliament in a white sheet, and to the Act of Indemnity of 1944. He thinks that this indemnity was entirely unnecessary, as it is difficult to see how any aggrieved fireman could have had a cause of action against the Home Secretary for anything done against him under the unlaid regulations. However, it gave Parliament the opportunity, if it had so desired, of forcing the resignation of the errant Minister, and of debating the matter.

Dr. Allen seems to think that with a reformed procedure Parliament could return to the nineteenth century practice of enacting legislation with all necessary detail included. He objects to the enactment of laws in the form of broad principles with details left to be worked out in the departments. I have already endeavoured to show that this is under present-day conditions an entirely unrealistic view of the legislative process. The need for a reformed procedure is only too evident. It should be used, however, to give Parliament a more effective supervisory control, and to make it a better institution for the ventilation of the numerous cases which are bound to occur of pinching shoes and even of injustices.

The Report of the Select Committee on Procedure on Public Business, and more particularly the evidence given before it, brings Dr. Allen up sharp against the present situation, and it is remarkable that after quoting so many eminent authorities as to the realities of the modern relationship of Parliament and executive, he should still retain his old-fashioned faith. These pages, particularly 128–131, show how very disturbed in his views our author has become, and his adjuration to the people of England ' not to live in a world of compromise and fiction '

might almost be an exhortation from the author's conscious to his subconscious mind.

'The Judiciary and the Executive' provides a useful analysis of the more important recent cases, starting with the *Institute of Patent Agents* v. *Lockwood*, [1894] A.C. 347, in his discussion of which case Dr. Allen adopts Sir Graham Harrison's criticism of Lord Herschell's celebrated construction of the words 'as if enacted in this Act'. Much of what he says in this chapter is based on the recommendations of the Donoughmore Committee, and will meet with general acceptance. Everyone admits, not least the Civil Service, that the present type of judicial control is of very little value, and it is to be hoped that under a new and more energetic government steps will be taken to implement the recommendations of that strong committee.

I am disposed, however, to cross swords with a section headed 'Vicarious Legislation', in which Dr. Allen roundly condemns the recent innovation (cf. the Catering Wages Act, 1943, s. 13) under which Ministers are given power to bring proceedings on behalf of individual citizens whose rights have been infringed under some statute which it is the duty of the Minister in question to administer. A similar proposal was made in the Beveridge Report in connection with the recovery of workmen's compensation, where, however, it involves nothing more than an extension of the well-known insurance doctrine of subrogation. There is a great deal to be said for the provision of new facilities of this kind; in the stronger trade unions they have long been one of the chief benefits of membership. Another advantage is that of getting difficult points of law decided after adequate argument. No one realises so acutely as the civil servant administering a new statute the inconvenience of the doubtful point which, left to the chances of private litigation, may take years to settle. A great deal of administration is conducted on the opinions of the law officers, often expressed 'with hesitation'. Yet it will be remembered that when the departments proposed to take powers to state cases on doubtful points under the Rating and Valuation Bill, 1928, for the opinion of the Court, all the conservative lawyers rallied against the suggestion with such effect that it was dropped. One of the arguments most relied upon was that it is 'extremely difficult to give a legal opinion of any value on a purely hypothetical question'. Academic lawyers are always doing so—perhaps their opinions are not of much value—and judges frequently do so as '*obiter dicta*', such

opinions sometimes forming the basis of later legal structures. Be this as it may, the significant point is, that when the executive accepts defeat on this score and attempts to invent a method by means of which it can get doubtful points cleared up on actual concrete cases, Dr. Allen is even more suspicious and regards the move as one ' big with evil tendencies, that a man should be made a plaintiff, whether he wishes it or not, at the bidding of a departmental understrapper '.

The final chapter in the scheme of the argument is in some ways the most significant of all, because here Dr. Allen departs from the legal peg on which he has hung his earlier discussions, and attempts a broad politico-sociological survey and analysis of modern government in the light of public opinion and the needs of the citizen. He gives a picture of the modern civil servant, in many ways acute, on the whole not unfair. From this he proceeds to adumbrate a number of the common form criticisms about red tape, overlapping, etc., which come so easily from the pen of one who can take an Olympian and uninformed view. A good example is the ' hypothetical case ' of the single family applying for relief, and which in theory can come within the jurisdiction of no less than nine departments. Of course it can, and if it could not the administrative organisation would be inefficient. But perhaps this is really an example of the ' extreme difficulty of giving an opinion on a purely hypothetical case '.

Again, the Making of Civilian Clothing (Restriction) Order, 1942, comes in for scathing comment, and Dr. Allen reports with glee that ' the whole mumbo-jumbo of pockets and side pockets and sub-pockets is abandoned, for the excellent reason that it was never worth while at any time—a fact to which, I am assured, any practical tailor could have testified from the beginning '. The fact of the matter is, that the whole of this business was carried out by a Controller of Civilian Clothing, specially brought in from the business world, who is one of the most eminent leaders in the textile industry. Further, it was organised in close consultation with the trade. It may well be that on this particular aspect of the matter, quite a trivial one when viewed against the background of the great problem of keeping the civilian population adequately clothed in war-time, a problem solved in most of its difficult aspects with astonishing success, a mistake was made by the business men who were responsible for it, but it is most unfair to pick on it as if it were one of the main problems on which the Board of Trade was engaged, and was a typical example of the stupidity of

government officials. The truth is that Dr. Allen is so intent on looking for misshapen trees that not only does he ignore the straight, comely timber, but completely fails to see the wood itself.

Again, take the scornful account of the Regional Commissioners for Civil Defence (called here Controllers), of whom it is said 'it is difficult to discover that they have ever done anything except add complication and delay to public business'. Having been personally for some years one of these complicaters of public business I may not be able to reply to this diatribe with complete impartiality, but on the other hand I can speak with knowledge, the lack of which vitiates so much of Dr. Allen's book. But I express not only my own opinion, for it was also the view of almost all the local government officers who had to contend with heavy enemy air-raiding, when I say that without the mobilisation of reserves both from within and without the Region affected, the cities attacked could not have coped successfully with the enemy. Such mobilisation was only possible through a regional organisation. Civil defence was a highly complicated business, and became one requiring highly elaborated technical methods. The effective building up of this defensive system over the country would have been quite impossible without regional supervision and control on behalf of the Minister of Home Security.

This chapter is, indeed, very little concerned with the requirements of, or with the views of, or indeed with the general citizen at all. It is just a peg on which to hang a few additional criticisms of the Civil Service by eminent judges like Lord Hewart, and, of course, by Dr. Allen himself. It glides imperceptibly into a chapter on the Executive at War, with which, as will have been noticed, a good deal of it was already concerned.

Here we have a rather cursory sketch of the legislation passed for war purposes both before and during the war. But Dr. Allen's object is not so much to describe this certainly elaborate system of law, nor to examine the difficulties which it was constructed to meet, as to discover its weaknesses, to point out how it could be used to curtail the liberties of the subject, and to pour such contempt upon it as will, he no doubt hopes, create a hostile public opinion towards it. There is a rich field for his sarcasm, and by careful hand-picking of the food regulations in particular, and of some of the more foolish prosecutions under them, he is able to build up a *prima facie* case against the Ministry of Food. And yet, when one considers that the

feeding of our population during the war has been so well done that, notwithstanding shortage of supplies and much overwork and difficult travelling, the people as a whole have been better fed than ever before, and their general health has reached a standard hitherto unknown, all this legalistic pin-pricking begins to assume quite minute proportions.

Nevertheless, Dr. Allen is right to draw attention to the danger of foolish prosecutions leading to disrepute of the law. But there is an equal danger of disrepute in the picking out of these odd cases as if they were typical. There were, in fact, and naturally, tens of thousands of infractions of regulations on which the officers responsible very wisely decided not to prosecute. Indeed, the law often tended to fall into disrepute rather because of a lack of energy in prosecuting than because of a few ill-judged cases brought to Court. This whole subject is one of great legal and sociological importance, and it is a pity that the analysis is so cursory.

Indeed, almost every one of the administrative instruments by means of which the war was fought to a successful conclusion is savagely passed upon; usually after some such disarming prologue as that 'the writer is not sufficiently acquainted . . . to venture any opinion about general efficiency. . . . He does not doubt that they have done valuable work; still less does he doubt . . . extraordinary powers were necessary'.

The administration of the Essential Work Order by the National Service Officers of the Ministry of Labour and National Service, 'a minor official of a status quite unequal to the dictatorial responsibilities which are assigned to him' is another typical example. The direction of men and women into essential war industries could only be done on an individual basis. It had to be undertaken in hundreds of thousands of cases. If Dr. Allen had paused to think the matter out he would have realised that it could only be undertaken by the local officers of the Ministry of Labour. No doubt it would have been better done by university graduates and others highly qualified, but it is in the highest degree unrealistic to suppose that with the existing demands on the highly trained intellects of the nation any such persons were available for the job. Incidentally, considering the size and complexity of the task the work was done with common-sense and judgment, and reflects high credit on the 'minor officials' concerned.

Another example of Dr. Allen at his most critical is his discussion of the famous Regulation 18B and its administration. Again he starts by admitting the need for 'extraordinary

powers ' and then gradually works up to a white heat of indignation about the whole business of imprisoning innocent people. If extraordinary powers are given and used on a fairly large scale in the conditions of emergency which existed in 1940 there are bound to be a certain number of mistakes. It is easy enough for a judge sitting serenely in the Court of Appeal to condemn these as ' cynical carelessness ', whatever cynical carelessness may be, but the truth of the matter is that lawyers are so instinctively hostile to imprisonment without trial, and it is a good thing that they are, that they cannot bring themselves to appreciate the situations under which this sort of thing has to be done.

Most of Dr. Allen's argument is really directed against the existence of 18B at all, but he also seems to make three points in respect of its administration. First, that officials were careless. This is rested mainly on *Budd's Case*, [1942] 1 A.E.R. 749, where the order was made on ' hostile associations ', instead of associations with the British Union of Fascists, a point which would appeal to a lawyer more than to the man in the street.

Secondly, that the Home Secretary did not always accept the opinion of the Advisory Committee to which the detainee was entitled to make objections. The number of cases where the Home Secretary rejected the advice of the Committee was small, but advice is only advice, and the Minister remained responsible, and very properly exercised his own judgment. The chairmen of the Committee, which sat in several divisions, were all eminent and liberal lawyers accustomed to the common law attitude of giving a prisoner the benefit of the doubt. In the conditions of imminent invasion, with fifth columns ready to come into action, it is not to be wondered at that the Home Secretary from time to time took the view that the interests of the community required that the prisoner should not have that benefit. If he had had to accept the advice of the Committee it would have become, in reality, a Court of Appeal, not an advisory body at all.

Thirdly, Dr. Allen complains that the prisoner was not given the full details of the case against him and was denied legal representation before the Advisory Committee. He approaches the matter as if the proceedings had been a trial at law, which, of course, they were not. This is clear from his treatment of *Knight's Case*, to which he devotes a whole appendix. Mr. Knight was fortunately able to get the whole facts of his case investigated by a civil Court in a libel action, and to show

that a great deal of what on the face of it was damaging *prima facie* evidence could not stand careful judicial scrutiny. Dr. Allen suggests that the evidence on which the detention order was made was ' tittle tattle ' and it is true that Hilbery J. used that expression to describe some of it. But there were no fewer than four witnesses, scornfully described as ' a common informer, a German refugee, a typist of twenty, and a parish worker ', each of whom gave material evidence against Mr. Knight. On the face of it there was no reason why the statements of any of these witnesses should not have been accepted, and if this be granted it must be obvious to any impartial person that the Home Secretary, who, after all, cannot see and hear the witnesses cross-examined, as can a judge in Court, had no alternative but to make a detention order. The *Knight Case* affords ample proof, if any were needed, of the value of a proper judicial investigation with adequate cross-examination of witnesses, but this is *ex hypothesi* what was not possible in 18B cases.

This brings us to the point about furnishing the detainee with particulars of the case against him. It is certainly repugnant to every English lawyer and, indeed, to every English citizen, that this should not be done. Unfortunately, in the great majority of these cases, to disclose the case would mean disclosing the way the evidence was obtained on which it was built up. This is, of course, the sort of information which the enemy organisations would sell their souls to obtain, and it must therefore be obvious to any except extreme exponents of the ' *fiat justitia ruat cœlum* ' school that the case cannot be fully disclosed. In practice, the Advisory Committee exercised a wide discretion over putting the case to the detainee, and this seems to be the only sensible course in practice.

Dr. Allen is not unaware of this important consideration for he goes out of his way to attack the Intelligence Branch (Military Intelligence 5). which was largely responsible for assembling the evidence in these cases. He sneers at the lack of ' that nice sense of the value of evidence which is a distinguishing characteristic of the military mind '. Now it is not my object to embark upon the defence of M.I.5, but if Dr. Allen had taken the trouble to make inquiries he would have found that the staff of M.I.5 is very largely made up of lawyers—at least one of them has achieved high judicial office. Indeed, in spite of the fact that so many of them wear uniforms, M.I.5 is not really a military organisation at all, and is much better

described as the Security Service, a title by which it is now generally known.

One of the most interesting sections of this chapter is that in which Dr. Allen attacks the decision of the House of Lords in *Liversidge* v. *Anderson*, [1942] A.C. 406. I agree with his preference for the dissenting speech of Lord Atkin on the proper construction of the words ' reasonable cause ' in the regulation. The fact of the matter is, that when the Government agreed early in the war to amend the wording of the regulation as first issued, *viz.*, ' if satisfied . . . that it is necessary ' to ' if the Secretary of State has reasonable cause to believe ' they gave too much away. It is surely obvious that if the question of whether the Home Secretary had reasonable cause can be tested in the Courts the matter is, in effect, taken out of his hands, for every decision he takes under the regulation becomes appealable, all the evidence must be passed upon in public, and much of the emergency value of 18B is lost. Had *Liversidge* v. *Anderson* gone the other way the result would have been an amendment of the regulation so as to bring it into accord with the needs of the situation.

I took part in the agitation against the original version of Regulation 18B, but I confess that I did not envisage the conditions in which the executive had afterwards to take action on behalf of the community, and I now see that my objection to it, based on a peace-time philosophy of civil liberties, was mistaken.

The final section of Dr. Allen's argument is devoted to an able analysis of the executive's position as a litigant. Everyone who has had experience of Crown side litigation knows that the scales are in most matters of practice and procedure heavily weighted against the subject. It would, as Dr. Allen contends, be far more satisfactory if we adopted a *droit administratif* on the continental model, and gave the ordinary citizen, when in conflict with the executive, a fair run for his money. The arguments against the existing semi-mediæval state of affairs are formidably argued here, and almost everyone, including the Civil Service, would favour an enactment on the lines of the Crown Proceedings Bill, drafted as long ago as 1927. It is just witch-hunting, however, to find the reason why no legislative steps have been taken in ' a silent but powerful hostility to any change among the departments '. Such a bill would obviously be a complicated and controversial measure, and would require a great deal of parliamentary time which cannot be afforded at the expense of more pressing social legislation. That such

necessary measures are held up for so long affords further evidence of the need for drastically overhauling the legislative machinery.

In his summary and conclusions Dr. Allen comes out frankly as a protagonist of *laissez-faire*; he does not think that the State can 'regulate all, or any great part of, the legitimate activities of the citizen'. Yet it is obvious that during the recent war it has done so, and with such success as to have brought the country to victory in most difficult circumstances. At the same time, the amount of regulation found necessary under war conditions goes much further than most of us feel like submitting to in peace. We should all subscribe to Dr. Allen's dictum that 'the greater good consists in the maximum of individual liberty which is compatible with the common weal'. The crux of the political and constitutional problem of the present age is concerned with fixing the boundary beyond which liberty cannot be conceded to the individual without our running the probable risk that it will be used to the detriment of the common weal, and with the making of provision for all those group and co-operative efforts which are essential to the full life of the Commonwealth, but which cannot be attained without some sacrifice of individual liberty. If Dr. Allen had faced this problem frankly he would have written a better book.

CHORLEY.

SOME ASPECTS OF THE LAW OF LANDLORD AND TENANT

ONE of the most important branches of the law is that relating to landlord and tenant. Its social effects are very great, seeing that a very large proportion of the population is directly or indirectly affected. Out of more than nine million dwelling-houses in England and Wales it would be a safe estimate to say that more than two-thirds are not occupied by their owners and are let to tenants. In addition, another considerable proportion of the population is concerned either as landlords or tenants of industrial premises.

In view of this, it is particularly desirable that, in so far as it be possible, this branch of law should accord with the current views of justice and fairness.

It will be interesting to examine some parts of the law to see to what extent it fulfils the desideratum I have mentioned.

And first, as regards the right of the tenant to the quiet enjoyment of the premises.

There is no implied warranty or covenant by the landlord with the tenant on the creation of a tenancy (a) that the landlord had a good right in all respects to create the tenancy for the term and according to the tenor thereof, and (b) for quiet enjoyment against all the world, but only as regards the landlord and persons legally claiming under or in trust for him.

The following are examples of this rule:—

(a) Where the property let is in mortgage, and the mortgage deed contains a clause negativing the application of section 99 of the Law of Property Act, 1925, a lease granted without the mortgagee's consent will be void as against the mortgagee.[1]

(b) Where the landlord being himself a lessee, grants a term to an under-lessee which is longer than the residue of the term of the head lease, and the under-tenant is evicted by the superior landlord on the expiration of the term of the head lease, the under-tenant has no remedy against anyone. Thus, in *Baynes & Co.* v. *Lloyd & Sons*[2] the defendants had a term of which eight and a half years were unexpired and granted to the plaintiffs a term of ten years. On the eviction of the plaintiffs by the superior landlord it was held that the duration of

[1] *Keech* v. *Hall* (1778), 1 Doug.(K.B.) 21.
[2] [1895] 2 K.B. 610, C.A.

any implied covenant for title or quiet enjoyment was limited to the defendants' own estate.

(c) Where the landlord is possessed of a term subject to a restriction with regard to user of the premises, there is no implied covenant for quiet enjoyment which would cover lawful interruption by a person claiming under title paramount. Thus, in *Jones* v. *Lavington*,[3] the defendant let the lower part of a house to the plaintiff without disclosing that his own lease contained a restrictive covenant against using the premises for the purpose of any trade or business. The superior landlord having obtained an injunction against the plaintiff restraining him from carrying on any business the Court of Appeal held that he had no remedy. In *Crawford* v. *White City Rink (Newcastle-on-Tyne), Ltd.*,[4] the plaintiff having been approached by the managing director of the defendant company *who suggested* that a rink of which the defendant company was tenant and occupier would be suitable for dancing, as a result entered into an agreement for the tenancy of the premises, and expended large sums of money for advertising, alterations, fittings, etc. The defendant company was the tenant of the Newcastle Corporation, and under the terms of its tenancy no dancing could take place without the permission of the Corporation, which was not obtained. The plaintiff had no remedy, and it was held that, even if the plaintiff, before entering into the contract, had asked the defendant company whether the premises could be let for dancing, and had been answered in the affirmative, *it would only have been evidence as to the subject-matter of the contract*, and could not control, vary or add to the terms of the written contract.

This last case exhibits a peculiarly unsatisfactory aspect of the law, seeing that even if a prospective tenant makes inquiries of his prospective landlord regarding his capacity to grant a proposed lease, he is no better protected than if he had done nothing.

The absence of an implied covenant that the landlord has a good right to create the tenancy according to the term and the tenor thereof is illogical, seeing that the assignor of a lease assigning as beneficial owner impliedly covenants that 'the lease or grant creating the term or estate for which the land is conveyed is, at the time of the conveyance, a good, valid

[3] [1903] 1 K.B. 253.
[4] (1913), 29 T.L.R. 318.

and subsisting lease or grant of the property conveyed, and is in full force, unforfeited, unsurrendered, and has in no wise become void or voidable '.[5]

It would create no technical difficulty if, in all contracts for tenancy, whether written or not, notwithstanding any agreement to the contrary, there were implied (1) a condition that the landlord had a good right to create the tenancy for the term and upon the conditions thereof, and (2) a covenant, as at present, for quiet enjoyment, free from disturbance by the landlord or any person claiming under or in trust for him, with the addition of the words ' or by title paramount '.

It is difficult to see what objections could exist to a proposal which is in accordance with our present standards of fairness and justice.

Secondly, apart from the Housing Act, 1936, and apart from any special arrangements, there is no implied warranty by the landlord that property (not being a furnished house or flat) demised or let to a tenant is fit for habitation or use. He is under no obligation to give a proposed tenant information regarding the state of repair of such premises, nor to disclose defects rendering the property dangerous, even though he is aware of their existence or created them himself.

Probably the most flagrant example of this rule is the case of *Davis* v. *Foots*,[6] in which the facts were as follows: The plaintiff agreed to hire a flat from August 28 from the defendants, who owned the flat and had lived there. The female defendant asked the plaintiff whether she would like to have a gas fire which was in one of the bedrooms. The plaintiff said she would not require it, and the female defendant then said that she would have it taken out. The defendant's son, on August 26, removed their furniture from the flat, and also disconnected the gas fire and removed it, but he did not leave any tap on the pipe from which the gas fire had been disconnected, by which gas could be prevented from escaping into the room. The plaintiff married on September 4, and her husband on the morning of that day got a representative of the gas company to turn the gas on at the meter, with the result that the gas immediately began to escape into the bedroom. The plaintiff and her husband occupied the bedroom that night, with the result that they were both asphyxiated by the gas, and the plaintiff's husband died of gas poisoning, and

[5] Law of Property Act, 1925, s. 76 (1), and Second Schedule, Part II.
[6] [1940] 1 K.B. 115.

the plaintiff became very ill but recovered. In an action by the plaintiff it was held that the defendants were not liable to the plaintiff in damages, as a landlord of an unfurnished house, in the absence of an express contract, is not liable to the tenant for defects in the house rendering it dangerous or unfit for occupation, even if he has brought about the defect itself or is aware of its existence.

An exception is created by the Housing Act, 1936; under section 2 (1) of that Act a condition with regard to repair is implied on the letting of a house at a yearly rent of not more than £40 in the County of London and of £26 elsewhere.

The effect of the very limited extent of this enactment has been reduced by judicial decision as follows:—

(1) In *Rousou* v. *Photi*[7] it was held that the word 'rent' in the Act included rates, where the latter were included in the payment of rent. As the great majority of working-class houses are let at rents which include rates, and which exceed 15s. 4½d. per week in the County of London, and 10s. per week elsewhere, the protection afforded by the Act is therefore largely illusory.

(2) Section 2 (1) of the Act (reproducing in substance sections 14 (1) and 15 (1) of the Housing, Town Planning, etc., Act, 1909, and also section 1 of the Housing Act, 1925) runs as follows:—

> In any contract for letting for human habitation a house [within the ambit of the section] . . . there shall, notwithstanding any stipulation to the contrary, be implied a condition that the house is at the commencement of the tenancy, and an undertaking that the house will be kept by the landlord during the tenancy in all respects reasonably fit for human habitation. . . .

The re-enactment of the section in this form is unfortunate, as Reading C.J. had, in *Ryall* v. *Kidwell & Son*,[8] made it clear that the obligations under the Act of 1909 were purely contractual, and that therefore a stranger to the contract could not recover. In this case the injured person was the tenant's daughter. It is surprising that the Legislature, having regard to the result of this method of drafting, did not express the enactment in other words, which would have saved the obligation from being entangled in the mesh of the common law.

(3) Failure by the tenant to give notice of any defect which

[7] [1940] 2 K.B. 379.
[8] (1914), 3 K.B., at pp. 135 and 140; see 5 MOD.L.REV. 266.

renders the house unfit for habitation will prevent the recovery of damages[9] unless it is latent.[10] This is so, though the Act says nothing of notice. It is due to the fact that, as stated above, the Courts have treated the relation created by the Act between the landlord and tenant as contractual.

(4) The effect of the Act has been further whittled down in cases where a building is let to a number of tenants and the lessor retains control of a common staircase. A tenant who suffers damage through the staircase being defective cannot recover, for it was decided in *Dunster* v. *Hollis*[11] that section 15 (1) of the Housing, Town Planning, etc., Act, 1909 (which, as stated above, is repeated in section 2 of the 1936 Act) did not impose on the lessor an obligation to keep the staircase in repair.

Taking an objective view, it seems illogical that a landlord should not be liable in the circumstances mentioned above, whereas the *occupier* of a building adjoining a highway is liable for damage suffered by a passer-by if the injury was caused in consequence of the disrepair of the property, whether he knew or ought to have known of the disrepair or not.[12] That is to say, under the rule enunciated in this case the obligation is absolute, though the justice of the rule is at least arguable, whereas in the other, where the ordinary rules of fairness require the landlord to be under a duty, he has no liability.

The opinions expressed by the House of Lords in the case of *Summers* v. *Salford Corporation*[13] may provide a means of escape from the doctrine that the obligation is one of contract, and that in order to render the landlord liable he must receive notice. It would seem that, in future, the section will be construed as creating ' a statutory obligation to repair imposed in the public interest ', and that the principle laid down in *Morgan* v. *Liverpool Corporation*[14] will be subject to reconsideration and will probably be reversed.

If the contractual element is eliminated it would seem that a person, other than a tenant, who suffers damage in consequence of the obligation to repair, would be successful in an action for damages against the landlord.

Unfortunately, it may be years before the point is settled; an example of the principle that the judiciary cannot give

[9] *Morgan* v. *Liverpool Corporation*, [1927] 2 K.B. 131, C.A.
[10] *Fisher* v. *Walters*, [1926] 2 K.B. 315.
[11] [1918] 2 K.B. 795.
[12] *Wringe* v. *Cohen*, [1940] 1 K.B. 229.
[13] [1943] 1 A.E.R. 68.
[14] [1927] 2 K.B. 131.

answers to legal questions unless it is provided with material in the form of proceedings before it, and of the consequent time-lag and capriciousness with which legal points are settled.

There seems to be no good reason why amendments in the Housing Act should not be made: by reversing the decision in *Rousou* v. *Photi*; by increasing the maximum of the rent of houses to which the Act applies so that working-class houses in general should be included; and by negativing the rule in *Dunster* v. *Hollis*.

Thirdly, a landlord is able with impunity to derogate from his grant in some respects. For example, if the tenancy is of a shop, and the landlord owns adjoining or neighbouring shops, he, unless he has expressly agreed with the tenant to the contrary, may let such shops to competitors of the tenant. And if, in fact, the landlord does agree with the tenant not to let his shops to a person carrying on the same trade, the agreement is not broken if *some* articles sold by the tenant are also sold by another tenant of the same landlord [15]; and even if the articles form an important part of the tenant's trade, if the general trade of the competitor is a different one from that of the tenant, the landlord has not broken his covenant.[16]

In *Port* v. *Griffiths* [17] a landlord let a shop for twenty-one years to a tenant, who covenanted to use it for the business of selling wool and trimmings. The landlord then let an adjoining shop to a competitor. The first tenant not unnaturally objected, but Luxmoore J. held that no restriction upon the landlord could be implied from the express restriction placed upon the tenant.

Fourthly, if a prospective landlord and a prospective tenant agree that the rates shall be paid by the tenant, as is usual in houses let by the quarter or longer, if the landlord manages (as frequently happens) to slip into the covenant or agreement to pay rates any one of the following words 'duties' or 'outgoings', or 'impositions', or 'charges', the tenant may find himself saddled with the cost of permanent improvements such as street paving charges, the cost of abating a nuisance, or of making drains in compliance with the requirements of the local authority; and it has been held that a tenant could not escape liability for bearing the cost of things (for which, by any reasonable moral standard the landlord should be liable) on the ground of the shortness of his tenancy. There are numerous

[15] *Lumley* v. *Metropolitan Railway* (1876), 34 L.T. 374.
[16] *Stuart* v. *Diplock* (1889), 43 Ch. D. 343.
[17] [1938] 1 A.E.R. 295.

cases on this point and the rule even applies to a yearly tenant.[18] This is so, even though the repairs which the tenant is to be under an obligation to do are clearly defined, or even if he is under no liability to repair at all. The unfortunate tenant has allowed himself to be entrapped and must take the consequences. Furthermore, if the rent is stated to be 'a net rent' or 'clear of deductions', the tenant will be liable (in the absence of express stipulation or indication to the contrary) to pay the general rate, poor rate, sewers rate, land tax and all other rates and taxes except property tax.[19]

Fifthly, the question of the responsibility for repairs is the cause of as many disputes as any in this unsatisfactory branch of the law.

In the absence of express agreement, the landlord is not liable to repair the demised premises. He is not even liable in the case of a weekly tenant whose rent has been increased under the Rent Restriction Acts for the *express purpose* of providing for the costs of repairs.[20]

It is very usual for a lease or a tenancy agreement to provide that the tenant shall be liable for interior repairs, but apart from express stipulation, the landlord is under no corresponding duty to keep the outside in repair. The result frequently is that the tenant, for his own protection, is compelled to do the outside repairs as well.

If the tenant has covenanted to repair 'fair wear and tear and damage by fire or tempest excepted', a covenant by the landlord is not implied to make such wear and tear or damage good.[21] If demised premises are destroyed or damaged by fire or tempest or other inevitable accident, the tenant, if he has agreed to keep them in repair, in the absence of some such words as 'damage by fire or inevitable accident excepted' is liable to make good the damage, even to the extent of completely rebuilding the premises if they are totally destroyed. And this is so even though the landlord has received insurance moneys of a policy insuring the premises.[22]

The gross injustice of this rule was brought home to me recently in a case in which I was professionally concerned. A

[18] *Francis* v. *Squire*, [1940] 1 A.E.R. 45.
[19] *Bennett* v. *Womack* (1828), 7 B.&C. 627.
[20] *Morgan* v. *Liverpool Corporation*, [1927] 2 K.B. 138, C.A.; *Wilchick* v. *Marks and Silverstone*, [1934] 1 K.B. 56.
[21] *Arden* v. *Pullen* (1842), 10 M.&W. 321; *Weigall* v. *Waters* (1795), 6 TermRep. 488.
[22] *Leeds* v. *Cheeham* (1827), 1 Sim. 146.

limited company took a lease of business premises at a considerable rent, one of the directors guaranteeing payment of the rent and the performance of the covenants. The lease, which contained the usual clause for the abatement of rent in case of accidental fire and a repairing covenant, was perused on behalf of the company and the guarantor by a solicitor, who omitted to insist that this covenant should be qualified by the words 'damage by fire excepted'. The premises were destroyed by accidental fire, with the result that though the rent was suspended in consequence of the fire, it only was suspended until the property was fit for occupation, and that under the unqualified covenant to repair the company was liable to rebuild, and not having done so, in spite of the fact that building was impossible owing to the prohibition by the Government (the company having gone into voluntary liquidation), my client became liable for the rent reserved by the lease for the remainder of the term, the liability running into over £10,000.

The landlord was insured against fire and received the insurance moneys. He sued the guarantor and obtained judgment. The guarantor filed his petition in bankruptcy, the landlord being his only creditor.

Sixthly, the tenant is liable to continue to pay rent, although the premises are destroyed or damaged by fire or inevitable accident, and the tenant's covenant to repair is qualified by the words 'damage by fire or inevitable accident excepted'.[23] And the principle stated above in *Leeds* v. *Cheetham* applies to rent also.

Seventhly, even when a landlord has either expressly or impliedly agreed to repair, he will not be liable to anyone (other than the tenant) who suffers injury by reason of the property being out of repair. Thus, in *Cavalier* v. *Pope*[24] a landlord agreed with his tenant to repair a defective house, but failed to do so. The tenant's wife was injured in consequence, but it was held that she could not recover. For the relationship between the landlord and the tenant is a purely contractual one, and a third person may not benefit from such a contract. But it would have been otherwise if she had suffered the injury when in the highway adjoining the demised premises.[25]

Whatever the explanation may be, the termor under a lease or tenancy agreement has always been the poor relation of those more fortunate who were seised of a freehold estate in land.

[23] *Belfour* v. *Weston* (1786), 1 TermRep. 310; *Hare* v. *Groves* (1796), 3 Anst. 687.
[24] [1906] A.C. 428.
[25] *Wringe* v. *Cohen*, [1940] 1 K.B. 233, where the authorities are discussed.

I make no apology for referring to rules of law with which lawyers are familiar. (Familiarity frequently breeds apathy or complacency as well as contempt.) My object is to endeavour to emphasise the extremely unsatisfactory state of this branch of the law. This is aggravated by the fact that a large proportion of tenancies are evidenced by documents not prepared by solicitors, and that in the present state of the law, as I have endeavoured to show, a tenant is liable to all kinds of traps which can only be avoided by a person technically competent to do so. It is unreasonable to expect citizens to incur the expense of employing solicitors to prepare what are apparently very simple documents and, indeed, it is useless to expect them to do so. The only other practicable course is to improve the law by removing the traps and making it in accordance with current opinion.

Those who are best able to initiate legal reform are, for a variety of reasons, unlikely to be subject as tenants to the injustices arising from the present state of the law. This is unfortunate, for nothing is better calculated to bring home to a man that there is a need of a reform, than to suffer the injustice himself.

It might seem surprising, seeing how unsatisfactory the law of landlord and tenant is, that the general public have not demanded reforms in this branch of the law. I think the reason for the lack of agitation regarding this, and also regarding many other common law rules calling insistently for reform, is due to the feeling by the layman that the law, like the soldier's pay book, is incomprehensible. There is also the fact that only a relatively small percentage of the population suffer at or near the same time from the same unsatisfactory legal rule. And it is a characteristic of Englishmen to bear with remarkable patience most ills, and especially those which they do not comprehend. Indeed, there is a tendency to regard a man who resents an apparent legal injustice as one with a grievance, and such a person is never popular.

It would seem, therefore, that the work of reform must be performed by the legal profession, and it is to be regretted that so much of the energies of its members is expended in the consideration of law either in its analytical or in its historical aspect, and so little to the consideration of its sociological effects. For though the lawyer *qua* lawyer is only concerned with law in its analytical aspect, and the assessment of relative values, the balancing of social interests and the production of schemes of legislation are not his function as such, he will be

only partly fulfilling his duty as a citizen if he considers law exclusively in its analytical aspect, especially as he is in consequence of his profession better able than most to understand what legislation, whether original or amending, is requisite in order that the law may perform its function.

For law is a means to an end. Its function is to give form and order to the political, economic, social and ethical ideas current in a State by furnishing a body of rules which shall regulate satisfactorily the formal relations of the State and its citizens, and those of the citizens *inter se*. It should be, as it can be, one of the principal means of conducing to human welfare.

B. PLUMMER.

THE NAPOLEONIC SYSTEM OF ADMINISTRATION IN FRANCE

THE many problems involved in the rebuilding of the social and political structure of France will be dealt with in due course by the French nation itself. It cannot be pretended, however, that Great Britain has no interest in the establishment of a stable, democratic form of government in France. For this reason it may be justifiable for us to examine briefly one of the more important, yet less obvious, aspects of this question. The nature and significance of the central institutions of government are easy enough to appreciate: the purpose of this paper is to suggest that the form of local government is also a matter of major importance.

The centralised administrative system which has prevailed in France was the work of the Revolution and Napoleon. Centralisation itself preceded the Revolution, which began with a spontaneous movement all over France for the establishment of local self-government. The National Assembly, alarmed at the prospect of the country falling under the control of thousands of little municipalities, but unwilling to perpetuate the *ancien régime* traditions of the provinces and *généralités*, attempted to canalise this movement by dividing France into *départements*. Successive revolutionary Governments found it increasingly necessary to forestall possible opposition by depriving both *communes* and *departements* of the machinery of free self-expression. Finally, Napoleon eliminated the elective principle completely, and substituted for it the authority of nominated *prefets*, *sous-prefets* and *maires*.

The machinery of administration thus created was too favourable to the powers of the State to be willingly sacrificed by any of the regimes that followed during the nineteenth century. In opposition, both republicans and monarchists might flirt with the idea of decentralisation, in power they upheld the centralised system of government. The reason for this is plain. Fundamentally it was not the administrative merits of centralisation that ensured its preservation, but its political advantages. The *prefet* was primarily the political agent of the Government. Casimir-Périer exposed the basic principle of the system in his declaration that it was not the duty of the Government to remain neutral in elections. The

Ministry is convinced, he said, that its continuance in office is vital to the interests of the nation. All Governments were of the same opinion, and the *préfet* was their chief instrument for putting it into practice. The situation was stated very clearly by a *sous-prefet* of Louis Philippe, appealing to a meeting to support the official candidate. 'My life, and that of my children', he declared, 'are in your hands. If the Ministry's candidate is not elected I shall lose my post.' The revolution of 1848 did not change the situation fundamentally, for Ledru-Rollin's *commissaires* were bitterly criticised for their attempts to influence the elections, and under Louis Napoleon the *candidature officielle* became a recognised institution. The first circulars of the Ministry of the Interior under the Third Republic proclaimed the liberty of elections, but instructed the *prefets* and *sous-préfets* to guide the electors. The failure of the MacMahon-de Broglie attempt to stifle the Republic at birth in 1877, when seventy *préfets* and 226 *sous-préfets* were changed for the purpose of making the elections, undoubtedly dealt a severe blow to their political prestige, and after this the more blatant forms of administrative pressure were gradually dropped. But in 1911 M. Gaston Jeze could still describe the *préfet* as 'essentially an electoral agent', whose future depended on his success in influencing the elections. To succeed, he said, a *préfet* must have '*une grande souplesse, peu de scruples et de la poigne*'. Like their predecessors, he concluded, the *prefets* of the twentieth century were the great enemies of the public liberties.[1] More recent critics have found the chief evil in the political pressure exercised by senators and deputies over the *préfets*.[2] It is probably true that, especially after 1918, the political influence of the *prefets* suffered considerable diminution. The Tardieu attempt to make favourable elections by a wholesale change of *préfets* proved a failure. But the close relationship and interaction of politics and the centralised administration, however its mode of operation may have changed, remained a basic fact of the political structure of France.

During the Third Republic, however, there was one important breach with the tradition of centralisation. This was the law of 1884 providing for the election of *maires*, which has been described as '*la loi essentielle et utile de la Republique, celle qui mieux que toute autre a assuré son triomphe et*

[1] G. Jèze, *Du rôle des préfets en France*, *Revue du droit publique*, 1911, t. 28.
[2] R. Maspétiol et P. Laroque, *La Tutelle administrative*, 1930, p. 324.

a durée '.[3] Despite this concession, the republican parties were on the whole profoundly suspicious of the policy of decentralisation. Gambetta is alleged to have replied, in 1879, to an advocate of federal ideas, '*Monsieur, si les idees que vous venez de m'exposer avaient la moindre chance d'etre écoutées, vous ne sortirez pas libre de cette chambre, et vous seriez fusille ce soir même.*' Decentralisation was particularly feared as likely to work to the advantage of clerical influence, and the unifying Jacobin tradition was still strong among the supporters of the Republic. '*C'est la centralisation*', declared one legal textbook, '*qui porte jusqu'aux extremités du corps social cette action, partie du coeur et revenant au coeur, qui lui donne la vie. C'est la gloire, c'est la force et le salut de la France*'.[4]

The monarchists put themselves forward as the advocates of decentralisation, but how this was to be reconciled with their authoritarian principles was never satisfactorily explained, and when the Third Republic had fallen, the Vichy régime was hardly marked by an effective extension of local liberties. The regionalist movement, despite widespread support, achieved little or no legislative success. The *décret-lois* of the Poincaré Ministry of 1926 improved the functioning of the bureaucratic machine, but did not extend powers of local government. It was still on the whole true, when the Third Republic came to its end, that as Hauriou wrote in 1913, '*Notre édifice administratif a été organisé au lendemain de la Révolution en l'an VIII, par le premier consul, avec une centralisation tellement énergique qu'après un siècle de durée et plusieurs poussées successives de décentralisation, il reste encore très fortement centralisé*'.[5] The administrative history of France, from 1789 to 1939, can thus justifiably be regarded as a unity. Can we draw any conclusions from this history?

The first point to note is that a system which has lasted so long, and through so many vicissitudes of government, must be deeply rooted in the political habits of the nation. Nevertheless, after 1871 there was a slow extension of the rights of local self-government. Those whose task it is to refashion republican institutions in France will have the choice between continuing and developing this tendency, or relying on the traditional methods. What is the case for centralisation? It rests on the furtherance of three main objects—economic improvement,

[3] A. Thibaudet, *Les idées politiques de la France*, 1932, p. 53.
[4] Trolley, *Cours de droit administratif*, I. 89.
[5] M. Hauriou, *Précis de Droit administratif*, 8th ed. 1914, p. 63.

administrative efficiency and political stability. The question we have to ask is whether centralisation has in fact promoted these three aims in the past, and is likely to promote them in the future?

As the supervisor of the economic life of the *département*, the *préfet* was the heir of the *intendant*. The activity of such an official could achieve important results in an age when economic activities were mainly localised; but during the nineteenth century the regulation of economic life within the departmental framework steadily became more difficult, until it finally broke down during the first world war.[6] How far the economic tutelage of the State shall be extended in France is a matter for discussion, but there can be no doubt that in so far as it operates it will have to be on a national and regional basis. Economic life has clearly outgrown the departmental mould. It requires larger regional divisions, which for that very reason will not be so easily fitted into a bureaucratic system presided over by the Minister of the Interior.

From the point of view of administrative efficiency also the value of the prefectoral system has changed in the course of time. Centralised authority was exercised by hierarchical control, by the *tutelle administrative*, and by the judicial process of *recours pour exces de pouvoir*. The first of these, the specifically bureaucratic form of control, has all the characteristic defects of bureaucracy. Its effects have been described as fear of responsibility, favouritism, political interference in administration, and '*fonctionnairisme*'. It is fundamentally incompatible with any degree of effective local self-government. In fact, as soon as the first steps were taken towards decentralisation it became necessary to rely chiefly on a new form of control. This was the *tutelle administrative*, which has been defined as '*l'ensemble des pouvoirs limités accordés par la loi à une autorité superieure sur les agents décentralisés et sur leurs actes, dans un but de protection de l'intérêt général*'.[7] This form of central control, also, has been severely criticised, as more often a hindrance than an aid to local government.[8] '*La tutelle administrative en France*', wrote Jeze, '*il faut le dire hautement, a fait faillite. Les préfets l'ont faussee en se servant de leurs pouvoirs de tutelle pour tracasser leurs adver-*

[6] Cf. H. Hauser, *L'organization gouvernementale française pendant la guerre: le problème du régionalisme*, 1924.
[7] Maspétiol et Laroque, p. 10.
[8] *E.g.*, H. Berthélemy, *Les réformes administratives et judiciaires de 1926*, 1926. p. 34. M. Dendias, *Le gouvernement local*, 1930, p. 113.

saires et pour favoriser leurs amis politiques.'[9] Its effectiveness gradually declined, and by 1926 it could even be claimed that it hardly existed except as a theory in text-books of administrative law.[10] Finally, we have the *recours pour excès de pouvoir*. The disadvantage here is the slowness, as well as the unsuitability, of judicial procedure for dealing with administrative problems. From the point of view of administrative efficiency, therefore, centralisation in France seems to be justly open to much of the severe criticism that has been directed against it. It is necessary to ask if any of these methods of control is capable of improvement, or whether the solution may not be to leave more independence of action to decentralised, democratic authorities in all those fields in which direct national administration is not necessary.

The third claim that has been made on behalf of centralisation is that it is needed for political stability. The history of France during the last century and a half hardly suggests that, if this were the object, it was successfully achieved, and we must ask whether the prefectoral system on the whole served to check or to promote the series of revolutionary changes of regime. It is clear that while a Government remained in the saddle its powers were greatly increased by the existence of a centralised administration. But this source of strength was also a source of danger. Protected from the impact of public opinion by a bureaucracy which naturally tended to represent conditions in the most favourable light, Bourbon, Orleanist and Bonapartist regimes in turn lost the support of the country without realising the fact. It was only necessary for a revolutionary movement to secure power in Paris for all resistance to collapse. Once the revolutionaries had obtained control of the Ministry of the Interior, the whole administration was paralysed. *Prefets* and *sous-préfets* were dismissed, sent in their resignations, or often, hopefully, their adherence. It is difficult to resist the conclusion that the centralised system of administration, while it stood in the way of timely adaptation, facilitated revolutionary changes of regime.

Our conclusion is, that in respect neither of economic and administrative efficiency, nor of political stability, can the claims of centralisation be supported in France at the present day. It is possible, of course, that a more decentralised form of government might have other and worse defects. It might

[9] Jeze, p. 280.
[10] H Berthélemy, *Droit administratif*, 1926, p. xxvii.

not work at all. But France had considerable experience in the functioning of local elective councils during the Third Republic. In the larger towns particularly, the *maire* and *conseil municipal* had considerable powers in practice and exercised them in some cases with conspicuous success. Decentralised administration of local affairs can, of course, merely spell corruption and inefficiency, but there is no reason for supposing that such results would necessarily accompany it in France. Above all, the decisive consideration is that local self-government has as obvious links with democracy as centralisation has with authoritarian forms of government. Over a hundred years ago de Tocqueville wrote, '*C'est dans la commune que reside la force des peuples libres. Les institutions communales sont a la liberté ce que les écoles primaires sont a la science: elles la mettent à la portée du peuple; elles lui en font goûter l'usage paisible et l'habituent a s'en servir. Sans institutions communales, une nation peut se donner un gouvernement libre, mais elle n'a pas l'esprit de la liberté*'. A century of further experience has not made de Tocqueville's verdict seem any the less true. Discussion there may be, and undoubtedly will be, over the size and nature of the areas of local government. The net-work of communes, varying in size from small villages to great cities like Lyon or Marseilles, is too well-established to be capable of fundamental modification, and too successful to require it. The future of the *départements*, and the possibility of concessions to regionalist opinion, is a more open question, but it is too complex a problem to be discussed here. Our object has not been to discuss detailed reforms, but to indicate the importance of the subject, and to suggest that when a new constitution comes to be drawn up for France, if we wish to understand its spirit, and draw any conclusions as to its essential tendencies, we will do well to look, not only at the forms of central government, but also at the scope allowed to democratic institutions of local government.

ALFRED COBBAN.

STATUTES AND REPORTS

LEGAL AID TO THE POOR AND THE RUSHCLIFFE REPORT

IN the last issue of this *Review* the present writer reported on the two schemes on legal aid to the poor submitted by Sub-Committees set up by the Conservative Party and the Labour Party.[1] While that article was being printed the report of the Committee under the chairmanship of Lord Rushcliffe, appointed by the Lord Chancellor (Lord Simon), was published and the entire problem assumed a completely new aspect.[2] The two political committees had seen most of the problems. Both had also felt a great deal of sympathy with the various proposals for reform. Yet it is clear that neither Committee had treated the subject in a manner that could be considered as approaching a convincing solution. The Rushcliffe Committee's report is of a very different character. It is a well-nigh exhaustive study of legal aid to the poor. It contains a most elaborate, and in some cases profound, discussion of the various suggestions for improvement made by recent writers and by the numerous experts heard by the Committee. Moreover, it embodies in its scheme a number of new ideas, the result of the Committee's own creative work. The Rushcliffe Committee may indeed have succeeded in giving a satisfactory answer to some of the most baffling problems of legal aid to the poor.

The Conservative Party scheme had treated legal aid in litigation with a considerable amount of understanding and sympathy, but failed to submit any suggestions for legal aid outside litigation. The Labour Party's scheme had avoided this error and devoted an equal amount of attention to both sides of the problem. But the Labour Party's Committee had confined itself to a few cursory remarks on the organisational side of the problem. Last, but not least, that Committee—like many others in the past—had failed to establish a proper connection between the organisation concerned with legal aid in litigation and that which administers legal aid outside litigation. The difficulty of establishing this connection is created by the necessity of keeping unimpaired the freedom of the profession, and at the same time securing to the independent

[1] See E. J. Cohn, 'The Political Parties and Legal Aid', in 8 MOD.L.REV. (1945), pp. 97 ff.
[2] Cmd. 6641/1945.

professional man a share in the legal aid work without, on the other hand, reducing the official legal-aid organisation to inefficiency or confining it to merely administrative work. This delicate task, it seems, has now been solved by the Rushcliffe Committee, at least to the extent to which any blue-print can solve a problem of this character.

The Rushcliffe Committee's scheme provides for a chain of legal advice bureaux of varying forms, permanent, semi-permanent and non-permanent. Any needy person can, without a means test, obtain legal advice outside litigation at any of these centres, either on the spot or by being referred to a solicitor on the advice panel. The client will, where possible, pay 2s. 6d. to the organisation, which on its part pays 7s. 6d. to the solicitor, if any, who has given the advice. A whole-time paid solicitor is in charge of a permanent advice office. He is supported by the necessary clerical staff. Semi-permanent and non-permanent offices are conducted by part-time paid solicitors. The whole organisation is set up under the control and supervision of an Area Committee, consisting of solicitors and members of the Bar, both of whom receive remuneration for their expenses and probably also a fee for such work as they have to attend to. England and Wales are to be divided into ten areas, the administrative county of London plus Middlesex forming one such area. For each of these areas one Committee is to be set up. Each Committee will have its own Area Secretary, a permanent official, who will be assisted by the necessary clerical and other staff, including, it is assumed, experienced accountants.

The Area Committees constitute the centres of gravity of the Rushcliffe Committee's scheme. They combine in their hands the task of supervising the organisation granting legal aid outside litigation with that of appointing, and hearing appeals from, Local Committees, which decide about applications for legal aid in litigation. The Area Committees are thus responsible for the general administration of the scheme in both branches within their respective areas. Control on the central level is in the hands of the Law Society, which on its part is answerable to the Lord Chancellor, who has authority to issue rules on the details of the scheme and to allocate a block payment to cover the expenses of the machinery to the Law Society. The latter allocates the necessary funds to the individual Area Committees. The headquarters of the Area Committees constitute at the same time permanent legal advice centres, so that the Area Committee does not work in the

seclusion of a back-room administration, but is intimately connected with the actual needs and desires of the population.

The connection between legal advice outside litigation and legal aid in litigation is made even more intimate by the proviso that, where the help that is required consists of assistance in correspondence or in negotiations requiring an amount of time and labour that cannot be considered as fairly covered by the payment of 7s. 6d. to the advising solicitor, the applicant must apply for a legal aid certificate to the Local Committee. The Committee will treat such an application in the same way as an application for legal aid in litigation.

Legal aid and legal advice are no longer to be granted exclusively to ' poor persons '. The Rushcliffe Committee—like the Conservative Party Committee—suggests that the term ' poor person ' is to disappear and to be replaced by the term ' assisted person '. That is by no means a mere change of terminology. The Committee states that in its view ' legal aid should be available in all Courts and in such a manner as will enable persons in need to have access to the professional help they require '. It is clear from the report that this basic principle has been elaborated by the Committee in a way which no fair-minded observer can possibly consider as ungenerous. As far as legal aid in criminal cases goes the Committee had, of course, a comparatively easy task. The Poor Prisoners' Defence Act, 1930, leaves in theory not much to be done, except that payments for counsel and solicitor should be put on a more appropriate level, that more adequate time should be allowed to the defending solicitor or counsel to prepare the defence, that the costs of the working of the system should be borne by the taxpayer and not, as at present, by the ratepayer and—last, but not least—that the necessary publicity should be provided so that the existence of the facilities that are available becomes known to those who require them. The Committee provides for all these and some other minor improvements. There seems every ground to hope that these improvements will result in a realisation of the intentions with which the Poor Prisoners' Defence Act, 1930, was passed.

The Committee had to carry out a much more difficult task in mastering the problems of legal aid in civil litigation. As regards the question of defining the scope of ' assisted persons ' the Committee had to choose between retaining or abolishing the present system of rigid limits of income and property. The Committee says rightly that the rigid system must result in hardships and anomalies among those whose income is just near

the limit. Nevertheless the Committee did not think it right to follow the example of the Poor Prisoners' Defence Act, 1930, and of many Continental laws which leave the delimitation entirely to the free discretion of the authority granting legal aid. Instead of that, the Committee worked out a complex system of rules which are intended to solve a twofold problem. In the first instance the Committee had to say who is to be granted legal aid. In the second instance, however, the rules are intended to carry out another basic idea adopted by the Committee, the purpose of which is to put an end to the present 'hit or miss' system of legal aid. In the Committee's view there are numerous cases where a party cannot be expected to finance the entire costs of his or her case, but where the party can be expected to contribute to the costs of the proceedings. In other words, the Committee has adopted the Continental idea of 'part assistance in litigation', and combined the machinery by which it is to be put into operation, with its definition of persons capable of receiving assistance.

In this task the Committee has applied a great amount of care and shown a generosity, which—one hopes—will be shared by the legislator. Some of the ideas which the Committee has adopted have also been adopted by the New South Wales Law, No. 17 of 1943,[3] but it is obvious that the Australian legislator has been left far behind by the Rushcliffe Committee in respect of generosity and attention to detail. This may not be obvious to the casual reader. The Committee recommends that full legal aid can be granted to a single man or a woman with an income of no more than £156 and capital of no more than £25, or to married men with an income of no more than £208 and capital of no more than £50. Persons earning a higher income or possessing a larger capital can be granted legal aid in part, *i.e.*, they have to contribute to the costs of the proceedings out of their own funds. This formulation is, however, little more than a nominal concession to the rigid system. For the terms 'income' and 'property' are to be understood in a sense which differs widely from that in which these words are used in the present law of legal aid to the poor. For all purposes of the scheme 'income' and 'property' do not mean the gross amounts earned or possessed by an applicant. They mean the amounts obtained by 'adjusting' the gross amounts. The adjustment is effected in the first instance in accordance with a

[3] A summary of this law will be found in the 'Review of Legislation 1943', *Journal of Comparative Legislation*, Vol. XXVII (3rd series, 1945, Part I and II) pp. 59 ff.

number of detailed rules, partly laid down by the Committee and partly to be laid down by the Lord Chancellor as rule-making authority. In the second instance, a certain amount of discretion—to be exercised within the limits of the other rules—is left to the Assistance Board, which according to the Committee's suggestion has the final decision on the question what the 'adjusted' income and property of an applicant is. Thus, in adjusting the income, any amount which the Assistance Board is by statute required to leave out of account is to be left out of account here. Amounts equal to the allowance which might be payable by the Assistance Board are to be deducted from the income of married men in respect of each child. Amounts paid or payable as income tax are to be deducted. Even more far-reaching are the adjustments in respect of capital. Any household effects, tools of trade, the house in which the applicant lives and under certain circumstances capital employed in his business, not excluding even a motor car genuinely required in the business, are not to be counted as part of the applicant's property. On closer inspection one begins to be a little doubtful of the value of some or even all of these rules. Clearly the Committee itself intends them to be rules of guidance rather than inflexible legal provisions. More than once the Committee points out that 'it is difficult to lay down general rules in advance' and underlines the necessity of leaving a certain amount of free discretion to the Assistance Board. There is no room for a detailed critical investigation of these suggestions within the limits of the present note. Yet it may be said that the co-operation of the Assistance Board is perhaps the least attractive feature of the scheme. The large amount of discretion which, notwithstanding all the details provided for by the Committee, must be left to the Assistance Board increases these doubts. The Committee obviously thought that difficult computations like those which are required for the operation of its scheme could not well be left in the hands of the Local Committees. There is a great deal to be said for that. Yet the Assistance Board hardly offers those guarantees of judicial independence which one might wish to find in the authority which is entitled to open or to close the gates of justice to needy persons believed to be entitled to claim the assistance of the law. Another criticism which one might venture to adopt from the New South Wales Act of 1943 might be that the amounts of capital which are allowed might be increased to £50 and £100 or even to £100 generally. There are many cases in which the entire system of 'adjustments'

will not help because there is no ground on which such an adjustment could be justified. In such cases the present maximum limits will appear rather low, notwithstanding the fact that persons with more capital are required to contribute to the costs and not to finance the entire case themselves. On the other hand, to leave out of account the full value of the house which the applicant inhabits might result in hard cases: why should a man owning and inhabiting a £2,000 house not take up a mortgage to cover the costs of a lawsuit? The New South Wales law provides a maximum value of £750, beyond which a house may be taken into account in the computation of the applicant's property.

The amount of part contribution which persons receiving part assistance have to make is not left to the decision of the Assistance Board. It is to be determined by the Local Committee. But the Local Committee is in this respect bound by a rather mechanical rule, laid down by the Rushcliffe Committee. The contribution is one half of the difference between the maximum income allowed for full assistance (*i.e.*, £156 or £208) and the actual adjusted income of the applicant. On the other hand, the applicant has to contribute all his adjusted capital over and above the maximum limits of £25 and £50. No assistance—apart from exceptional cases—is to be granted to persons with an income of more than £420 or a capital of more than £500. It will be seen that while formally the Local Committee has jurisdiction over the amount of the contribution, the actual decision lies here too in the hands of the Assistance Board, because the result depends solely on the adjustment of the applicant's means and property which is left to the decision of the Assistance Board. Only if a change of circumstances such as an illness of some duration occurs has the Local Committee the power to review the contribution. The Committee may also permit the parties to make the contribution in instalments, though in the case of the plaintiff this should be done only in 'exceptional circumstances'. One might perhaps venture to think that this distribution of jurisdiction between the Local Committee and the Assistance Board would be capable of improvement. On the other hand, the Committee permits the Local Committee to fix a lower contribution where the actual costs of the action are not expected to reach the contribution which the applicant would have to make. It may be thought that the discretionary powers of the Local Committee might be capable of enlargement so that special circumstances prevailing

at the time when the Local Committee decides may be taken into account more fully than appears possible at present.

Nevertheless it is clear that the Committee's suggestions, if adopted by the legislator, would result in a very substantial increase in the number of assisted persons compared with the present system. Parallel with this enlargement goes the abolition of the present rule which restricts the grant of legal aid to proceedings in the High Court. The Committee has adopted the very sound principle that legal aid is to be granted in every Court in which audience is normally granted to barristers and solicitors, including, of course, the county courts. The only cases that are excepted from this rule are judgment summonses and cases of a defendant where the amount of debt is admitted and the only question is as to method of payment. Thus a controversy is, one hopes, brought to an end that should never have come into existence. The Committee makes short work of the views of one witness that the granting of legal aid could serve no useful purpose in county courts and that the judge could watch the interests of unrepresented litigants. It is the argument that Horace Twist killed in the House some 120 years ago[4]: 'Did the judge take all advantage to defeat the prosecutor and acquit the prisoner? Then, as judge, he betrayed his oath of office. Did he decline to take those advantages? Then as counsel for the prisoner he deserted his client'. What was then said of criminal law applies with equal force to civil cases. The reform recommended by the Rushcliffe Committee removes what must be considered as an unjustifiable feature of the present English law of legal aid to the poor.

Yet there can be little doubt that the Committee would not have discharged its duty of devising a working machinery for the new law of legal aid to assisted persons, if it had not also made an end to the present rule under which neither counsel nor solicitor receives any compensation for his work on behalf of the assisted person. On the contrary, things would probably become much worse if the present system of legal aid by volunteers had to serve the greatly enlarged needs of an organisation granting legal aid in all Courts. It is the merit of the Rushcliffe Committee not to have adopted a course which other laws have adopted, of which type the New South Wales Act of 1943 is the latest example. It would have been cheaper for the public

[4] *Hansard* (2nd series) XV, 610; quoted by Holdsworth, *The Movement for Reforms in the Law* (1793–1832), in 56 *Law Quarterly Review* (1940), p. 220.

chest to transfer all poor persons cases to a public solicitor, as did the New South Wales legislator, or to an organisation such as is the present Services Divorce Department. But that saving would have been made at the expense of depriving the independent profession of practically all connection with legal aid. It would have introduced into the organisation of professional representation an official and bureaucratic element, which is fortunately utterly alien to the traditions of the English legal profession. The Rushcliffe Committee has therefore been well advised to reject all those schemes and stick to the expensive, but, at the same time, the only justified course in holding that free professional men, freely chosen by the client to whom legal aid is being granted, must represent the assisted party, and that the expense of such representation has to be borne by the taxpayer. The importance of that principle is such that the details of the machinery by which it is being carried out hardly matter.

The Committee provides for various panels of barristers and solicitors specialising in the various types of work of the profession. Any member of either branch of the profession who is willing to help in legal aid to assisted persons is to place his name on one or several of these panels. By doing so he undertakes to represent any client to whom legal aid has been granted by a Local Committee or, on appeal, by an Area Committee, and who chooses him as his representative. Any expenses that are required by the solicitor in the conduct of the case are paid out by the Area Committee after details of the amount required and the reasons why it is required have been submitted. Profit costs are payable to the solicitor at the conclusion of the litigation at the rate of 85 per cent. of the taxed solicitor and client costs. Briefs to members of the bar are to be delivered unmarked. The Taxing Master will fix the fee which he would normally allow on taxation. 85 per cent. of this will be allowed to the barrister. The rate of 85 per cent. has been chosen on the assumption that 70 per cent. represents the overhead expenses of a solicitor, so that the rate of 85 per cent. represents one half of the profit normally remaining to the solicitor. Barristers, of course, have much lower overhead expenses. The rate of 85 per cent. in respect of barrister's fees seems to have been adopted with a view to using the same figure for members of the bar that is applied to solicitors, the overhead expenses of members of the bar differing so widely that they cannot even be approximately assessed. There will be hardly any doubt that the Committee has treated both

branches of the profession with the same generosity that it has shown to the assisted persons.

It would be tempting to go into further details of the scheme. The amount of labour which the Committee has bestowed upon them is proof of the seriousness with which it has treated its subject and of the importance which it has attached to it. What has been said, however, will be sufficient to show that this report is a document of first-rate significance for the entire development of English law. Its acceptance will result in a considerable proportion of all Court business being financed by the State. The Committee has seen to it that this will not mean the end of the freedom and independence of the bar. But it will be clear that, where State subvention has to keep a considerable part of the machinery of justice in operation, a new phase in the relation between the State and the law will begin. The rule-making functions of the Lord Chancellor, and his control of the complex organisation of legal aid, will probably soon result in the renewal of the demand for a Ministry of Justice. The fact that large sections of the community can conduct their lawsuits free of charge or at very small expense, will lead to demands for a revision of the system of costs and of the entire system of civil procedure which—as Mr. Claud Mullins has shown [5]—is so very largely responsible for the exorbitant costs of proceedings. Yet even more important than all this is the fact that the opening of the Courts to whole classes of the population, so far excluded from them, cannot be without influence on the future development of substantive law. Legal questions that could never be brought before the Courts will claim judicial attention. Questions that were lurking in the background will assume a new significance. Questions that appeared as minor topics of purely legal interest will be presented in their true social and economic setting. Bench and bar alike will be brought into contact with problems that have so far succeeded in escaping their attention. Those who are inclined to welcome such developments will feel grateful to the Rushcliffe Committee for the courage with which they have taken the first step on a road the end of which nobody can see. They will note with satisfaction that the Committee comprised men of all parties and of very different walks of life. That the citizen of the modern State has a right to receive legal aid seems to have become a principle upon which, happily, all are agreed. The Rushcliffe Committee's report is

[5] Mullins, *In Quest of Justice* (1930), pp. 197 ff.

proof that one can agree not only upon such general and abstract principles, but—what is much more important—about the manner of their practical realisation. For a period that is likely to bring many reforms in its wake this seems indeed a most fortunate omen.

E. J. COHN.

INTERNATIONAL CARTELS

(as envisaged by the White Paper Cmd. 6709)

THE solution of the problem of International Cartels and their Control has been taken an important step further by the proposals of the Secretary of State of the United States of America of December 6, 1945 'for Consideration by an International Conference on Trade and Employment', which the British Government has accepted as a basis for international discussion and presented to Parliament in form of a White Paper.

The White Paper is one of three White Papers embodying the results of the recent negotiations with the United States. It is the commercial counterpart of the financial agreement reached at the Conference at Bretton Woods.

The primary aims of all these agreements connected with the American loan to Britain is the economic co-operation of the peoples of the world as the foundation of an expanded trade. The White Paper with which we are here concerned envisages 'an International Trade Organisation, the members of which would undertake to conduct their international commercial policies and relations in accordance with agreed principles to be set forth in the articles of the Organisation'.

Cartels were in the past widely used as means of international collaboration. Whether or not they are desirable they will in the future play an important part in an ecomonic world of planning and organisation. No international economic charter would be complete which would not face this fact, and the functions of cartels as instruments of economic co-ordination on the one hand, and the dangers involved in the concentrated economic power of organised industrial groups on the other hand. It is, therefore, only natural that the United States' proposals should devote a great deal of attention to international (inter-governmental and private) cartels and to the problem of their control.

I

THE White Paper distinguishes between *State Cartels*, termed ' Inter-governmental Commodity Arrangements ' on the one hand, and *Private Cartels*, which it ominously calls ' Restrictive Business Practices '.

Every cartel, whether between Governments or between private firms or combinations of private firms, is ' in restraint of trade '. An International Trade Organisation aiming at ' an effective expansion of world production, employment, exchange and consumption ' can tolerate cartels only as exceptional and temporary means of economic adjustments in circumstances where the solution of a particular economic problem cannot be left to the free play of competitive forces without causing widespread distress to small producers or widespread unemployment.

1. By far the greater part of the Cartel Regulations deals with *Government Cartels* for the control of production of and trade in primary commodities.

Inter-governmental commodity arrangements were the subject of previous considerations under the auspices of or by the organs of the League of Nations and the United Nations Organisation.[1]

The difficulties arising from the production of and trade in primary commodities are ' different in character from those which generally exist in the case of manufactured goods; and these difficulties, if serious, may have such widespread repercussions as to prejudice the prospect of the general policy of economic expansion '.

In order to meet such difficulties of a fundamental nature the White Paper suggests that the Governments themselves should intervene in accordance with an agreed procedure and with established rules for the institution and operation of Government Cartels.

Inter-governmental Cartels are confined to primary commodities, in contrast to fabricated goods. Members of the organisation have to submit their particular commodity problem to an investigation of their root causes by the proper study group of the organisation. The organisation will then determine, in accordance with approved procedures, whether or not

[1] Cp. Koch, *Modern Law Review* (1945), pp. 132 ff. Monetary and Economic Conference, 1933, *Report of the Bureau to the Conference*, pp. 18 ff. *Committee for the Study of the Problem of Raw Materials* (1937), Vol. II, p. 7. United Nations Conference on Food and Agriculture of 1943, as reported in *Inter-governmental Commodity Control Arrangements*, pp. xvi ff.

the orderly solution of the specific problem requires the proposed inter-governmental agreement involving the limitation of production or trade, or the allocation of markets.

The agreements must be open for access to all members, and those representing consuming countries must have the same voting power as producing ones.

In consequence of their temporary character such agreements are proposed to remain in force initially not more than five years, and they should be renewed only if during the initial period substantial progress toward a solution of the underlying problem has been accomplished, or if the renewed agreement contains revised provisions to that effect.

Full publicity is provided for any proposed or concluded agreement, its operation, and for the measures adopted to correct the underlying situation which was the cause of the agreement.

2. Outside the field of primary goods Governments are not expected to intervene by formation of cartel agreements unless the organisation finds that exceptional circumstances justify such action. The planning and organisation of economic collaboration in respect of fabricated goods is left to private initiative. The members of the organisation, however, are called upon to curb by individual and concerted efforts any *restrictive business practices* which have the effect of frustrating the objectives of the organisation.

The White Paper proposals refrain from establishing economic objectives or principles for private cartel agreements, or from laying down particular rules of procedure for determining their economic justification, as they do for Intergovernmental Arrangements. On receiving complaints about the activities of cartels from State members or, with their permission, from commercial enterprises within their jurisdiction, the organisation would call upon any member to furnish the organisation with relevant information and would, if warranted, make ' recommendations ' to the appropriate members for remedial action in accordance with their national laws and procedures. The members may or may not follow such recommendations. The organisation is empowered to request ' reports from members as to their actions in implementing such recommendations '.

It appears that the proposals are not a proper ' Cartel Convention ', the parties to which undertake to enforce the measures adopted or imposed by the International Control Authority by their national legislation and jurisdiction.

Obviously a first attempt at concerted action to control international cartels could not go as far as that without courting failure. The issue of whether a cartel is good or bad is not a legal but an economic one. It will be answered in a different way in different countries at different times. An international cartel may serve the purpose of the expansion of trade today and may restrain production, distribution and consumption tomorrow without any alteration of its purpose or practices, simply because of a change in economic conditions in one or the other country. It is not the task of the lawyer to decide economic questions, and it seems completely wrong to base decisions of that kind upon a rule of law. The experience with the American and English practice to entrust a Court of law with the decision whether a cartel is ' reasonable ' or not against ' public policy ' does anything but recommend the extension of this practice to other countries or to the international field.

The attitude of the various countries towards cartels forms part of their sovereign economic policy. None of them will be prepared to surrender its sovereign powers in that respect to an International Court of Justice deciding a most complex economic problem under a rule of law. The Governments will be anxious to retain their power to decide for themselves, on economic grounds, which would be the best way to deal with a particular cartel, under the ever-changing conditions of their national economy.

The *rule of law* in the field of international cartels must confine itself to cartel *practices*, in contrast to the purpose and effect of cartels, and will form part of the wider subject of the law on unfair competition. The decision that a cartel is, in principle, good, does not imply that it may carry out its objects by any practices which the management thinks fit to adopt. Business measures infringing the national laws against unfair competition are illegal within the jurisdiction of this particular country. It is provided that the International Trade Organisation should promote the adoption in all countries of codes of fair business practices, designed to facilitate and enlarge the flow of international trade.

The White Paper shows, however, the way to more far-reaching and more effective agreements between members. They may, by bilateral or multilateral accords, co-operate in implementing any remedial order issued by one of them within their own jurisdiction. Such plurilateral conventions may become the nucleus of an all-comprehensive international cartel convention, under which all parties to it undertake to enforce

remedial actions by an international control board within their own jurisdiction.[2]

It forms part of its sovereign rights that every country may, within its own jurisdiction, take any measures against international cartels which it thinks appropriate, even if the Organisation does not see any reason to act.

II

THE International Trade Organisation will have an '*Executive Board*' of not more than eighteen members and, for the special cartel control, two commissions: the '*Commodity Commission*' and the '*Commission on Business Practices*', which are responsible to the Board and consist of experts appointed by the Board. These commissions have both important functions and powers of cartel control, such as investigating, collecting and analysing information, designating members to participate in an advisory capacity in the formulation of intergovernmental agreements, designating their chairman and secretary for commodity councils established to administer a commodity agreement, and advising the Board on recommendations to be made to members with regard to remedial actions, the establishment of a uniform national cartel policy, etc.

III

IT is to be hoped that, if the Anglo-American proposals for the organisation of international trade should be adopted by the Conference in June of this year, they will in time, and on the basis of practical experience, lead to the establishment of an effective system of control of international cartels, so as to ensure that cartels will become true servants and welcome instruments of international economic organisation.

F. E. KOCH.

[2] As suggested by Koch in MODERN LAW REVIEW (1945), pp. 141 ff.

NOTES OF CASES

THE LIMITS OF CONSTRUCTIVE MURDER

R. v. *Jarmain*, [1945] 2 A.E.R. 613, is the case of a 'hold-up' with fatal results. Armed with an automatic pistol, the accused went to a garage in order to commit armed robbery. He found a woman cashier, fired a shot from which she died after two days, and completed the robbery. The only evidence as to the circumstances of the killing was that of the accused. According to him, the deceased woman had refused to obey his command to hand over the money she had been counting. He had then changed over from his right to his left hand the gun, which he had been pointing at her, and had cocked it twice, thus allowing one live round to be ejected and introducing another live round into the breech. He had intended to frighten her but had not intended to fire. He had pressed the trigger inadvertently and when he had realised that he had shot the woman he had grabbed a pile of notes and run out.

Charles J. directed the jury that the accused was guilty of murder, even if his evidence was accepted, as he had caused the death of another person in the course of committing the felony of armed robbery, and the jury returned a verdict of murder.

This verdict was undoubtedly justified and the direction to the jury unobjectionable; the Court of Criminal Appeal was, therefore, bound to dismiss the appeal. But in doing so, Wrottesley J., who delivered the judgment of the Court, dealt with the argument upon which the appeal was based in a manner which deserves attention.

It had been argued that the accused would have been guilty of murder, as he had killed in the course of committing a felony of violence, if he had been inadvertent as to the result of his actions. His inadvertence, however, concerned the very act of killing itself. He had not acted voluntarily, his will did not go with the action of his finger in pressing the trigger.

This argument proceeded upon the distinction between the requirement of voluntariness and that of foresight of the consequences of an act as essentials of criminal liability. English criminal lawyers are indebted to Mr. J. W. C. Turner for his explanation of this distinction in his article on 'The Mental Element in Crimes at Common Law' in Vol. VI of the *Cambridge Law Journal*, p. 31. In this article Mr. Turner regrets

the definition of constructive murder established by the House of Lords in *Beard's Case*, [1920] A.C. 479, because it dispensed with the requirement of foresight of death. Whatever the merits of this contention, it would seem futile to renew the attack on this decision which has been followed on several occasions. The present moment, when all available resources are needed to deal with the alleged ' crime wave ', would in any case be inopportune to plead for relaxation of the law.

Different considerations would arise, however, if it were proposed to tighten the law by abandoning the requirement of voluntariness of the acts of the accused. *Beard's Case* would provide no authority for this, and throughout Mr. Turner's discussion of the requirement of voluntariness of the prisoner's conduct it is indeed taken for granted that no serious attempt has been made to reduce modern criminal law to that primitive condition in which it would be no defence to plead—in Mr. Turner's phrase—that ' I could not help killing him '.

Apart from the unfortunate decision in *Larsonneur* (1933), 24 Cr.App.R. 74, there has only been one recent occasion to deal with the requirement of voluntariness, namely, the decision of the Divisional Court in *Kay* v. *Butterworth*, reported in *The Times* Newspaper, June 7, 1945. The Court there reversed an acquittal on a charge under sections 11 and 12 of the Road Traffic Act, 1930, where the accused had been overcome by sleep whilst driving. The decision was, however, given on the ground that the driver must have known that drowsiness was overtaking him, and that he had acted voluntarily in failing to stop and wait until he had shaken it off. Mr. Justice Humphreys, moreover, emphasised that the case was different from that of a person who, through no fault of his own, became unconscious while driving, for example, by being struck by a stone or by illness, who ought not to be liable at criminal law.

It is clear that no question of involuntariness in the sense of the example given by Mr. Justice Humphreys arose in *Beard's Case*. It had been argued there that Beard had caused the death of the deceased accidentally, as he had placed his hand over her mouth to prevent her screaming, and not with the intention to kill. It was held that this could not affect Beard's liability for murder. In *Jarmain's Case* the prosecution maintained that this ruling answered the argument raised by the defence, and this contention was adopted by the Court. Yet Beard's action was only accidental in the sense that he did not

foresee death, it was not involuntary in the sense of the illustrations given in *Kay* v. *Butterworth*, or in the sense in which Jarmain's pressing of the trigger was described as involuntary by the defence.

It would seem then that the decision in *Jarmain's Case* could not be supported by the authority of *Beard's Case*. It is submitted, however, that this did not leave the Court with the choice of extending the meaning of constructive murder so as to constitute it not only as an exception to the general requirement of *mens rea* in the sense of foresight but also as an exception to the requirement of voluntariness, or quash Jarmain's conviction on the ground of misdirection. It was possible to dispose of the argument of the defence by demonstrating its irrelevance to the facts of the case. In other words, it was possible to concede that there can be no criminal liability for an involuntary act, and then to explain that this rule did not assist the defence as Jarmain's pressing of the trigger was not ' involuntary ' nor an ' act '.

The immunity for involuntary conduct is usually illustrated by cases in which the action is impelled by extraneous force or in which the absence of physical control would be established beyond doubt, as by sleep-walking, insanity, or sudden illness. Thus, Mr. Turner speaks of the case where

> B holds a weapon and A, against B's will, seizes his hand, and the weapon, and therewith stabs C; and possibly an act done under hypnotic suggestion or when sleep-walking [an instance of this is provided by *Fain* v. *Commonwealth*, 1879, a decision of the Court of Appeals of Kentucky, 78 Ky. 183, 39 Am.Rep. 213, quoted in Michael and Wechsler, *Criminal Law and its Administration* (1940), p. 29] or by pure accident. In certain cases of insanity, infancy and drunkenness the same defence [of involuntariness] may be successfully raised.

It would not seem difficult to distinguish cases of this kind, or those quoted by Humphreys J. in *Kay* v. *Butterworth*, from the absent-minded and unintentional pressing of a trigger. A strict interpretation of ' involuntary ' would, moreover, have much to commend it on grounds of policy.

Again, it would seem that in considering the defence of involuntariness the whole of the accused's conduct should be considered rather than an act forming merely part of it. The importance of this point was stressed by the Court in *Jarmain's Case*, where Wrottesley J. explained that—

> in effect, the argument for the appellant rests on the

> proposition that you must isolate the pressure of the appellant's finger on the trigger of the pistol from all the surrounding acts and circumstances which made it a deadly thing to do. *The act in the performance of which the appellant killed the woman was robbery with arms which was compounded of many elements and circumstances.* The pistol must be loaded, cocked and presented at the woman as well as fired in order that her death might result. . . .

In American decisions on constructive murder the same point has been made by using the conception of *res gestæ*, defined in *State* v. *Turco* (1923), 99 N.J.L. 96, as 'those circumstances which are the undesigned incidents of a particular litigated act'. (See also Michael and Wechsler, *op. cit.*, pp. 222–3.) It may not be advisable to introduce the terminology of the law of evidence into substantive criminal law, but it has the merit of drawing attention to the danger of adopting what might be described as an atomistic approach to problems of criminal liability.

In conclusion, it is submitted that it is preferable to treat *Jarmain's Case* as turning on the meaning of 'involuntary' and on the meaning of 'act' rather than as authority for an extension of constructive murder at the expense of the principle of the criminal immunity for involuntary conduct.

J. UNGER.

THE ABSOLUTE BARS TO DIVORCE

SECTION 178 (2) of the Judicature Act, 1925, as amended by section 4 of the Matrimonial Causes Act, 1937, provides that the Court shall dismiss a petition for divorce if it is not satisfied as to the absence on the part of the petitioner of connivance at adultery, condonation of adultery or cruelty, or collusion with the respondent whatever be the ground of the petition. The whole section is of fundamental importance in our divorce law because section 178 (1) entrusts the Court with the duty of inquiring, so far as it reasonably can, into the existence of the above matters, thus justifying the frequent statement that divorce by consent or in default of defence is unknown to English law. It is therefore somewhat surprising that much obscurity should surround such questions as the onus of proof, the nature of collusion, the extent to which a husband may negotiate as to damages with the co-respondent without being guilty of connivance, and the effect of condonation. In view of the practical importance of these matters any case which

tends to throw light on them is worthy of comment, and it is proposed to discuss three decisions of last year under the four headings already indicated.

Before doing so, however, it will be convenient briefly to state the facts of two of these. In *Churchman* v. *Churchman*, [1945] P. 45, the petitioner had indulged in lengthy negotiations with the co-respondent, who was throughout living in adultery with the respondent, as to the amount at which he would be prepared to compromise the claim for damages which he constantly threatened to make. These proved abortive, and the Court of Appeal held that Denning J., although rightly regarding the case as one in which no award of damages should be made, was wrong in dismissing the petition on the ground of connivance, because an attempt to make a collusive bargain for an admitted wrong could not be held to have effected a notional conversion of the petitioner's strenuous objections to the respondent's adultery into connivance at it.

In the later case of *Emmanuel* v. *Emmanuel*, [1945] 2 A.E.R. 494, Denning J. dismissed a wife's petition founded on cruelty because he was not satisfied as to the absence of collusion. The husband had filed an answer denying the cruelty and informed his wife that he was only defending the case because of the possibility that she would claim maintenance. Upon her stating that this was not her intention, he prepared an undertaking to this effect which she signed. The document was retained by the husband's solicitors against the protests of those acting for the wife. The answer was not immediately withdrawn, but, shortly before the hearing of the case, the husband's solicitors indicated that it would not be defended.

1. *The onus of proof.* Whatever view may be taken of the last-mentioned decision on its particular facts, there can be little doubt that the judgment of Denning J. coupled with that of the Court of Appeal in *Churchman* v. *Churchman* (*supra*) has clarified the law as to the onus placed upon the petitioner by the amended section 178 of the Judicature Act, 1925. (See also 61 *Law Quarterly Review*, 379 *et seq.*) Certainly he must prove a negative by satisfying the Court that there has been no connivance, condonation or collusion, but the altered wording has not, as it was at one time thought to have done, 'swept away' the presumption of law against connivance. (*Germany* v. *Germany*, [1938] P. 202 at p. 206; *Poulden* v. *Poulden*, [1938] P. 63; *Lloyd* v. *Lloyd*, [1938] P. 174.) The presumption remains to assist the petitioner, but it is, as Denning J. points out in *Emmanuel* v. *Emmanuel*, [1945] 2

A.E.R. at p. 496, ' a provisional presumption ' only; ' a presumption (like the presumption of testamentary capacity or the presumption of negligence in cases of *res ipsa loquitur*) from which the Court may (not must) infer the fact in issue and which puts on the other side (when there is one) the provisional burden of calling evidence or taking the consequences '. Hence, when the Court's suspicions are aroused, the petitioner is left where he began with the ' legal burden ' of proving the absence of connivance, collusion or condonation ([1945] 2 A.E.R. at p. 497).

It would be beyond the scope of this note to comment in detail on the distinction drawn by Denning J. between the legal and provisional burdens of proof, and one may be permitted respectfully to agree that the matter is substantially one of ordinary good sense ([1945] 2 A.E.R. at p. 496). Nevertheless, it is one thing to enunciate the law with clarity, and another to apply it, and it is in the latter respect that the position with regard to the onus of proof placed on the petitioner by section 178 of the Judicature Act, 1925, seems questionable. This is particularly true of collusion, for, as is shown by the facts of *Emmanuel* v. *Emmanuel* (*supra*), the answer to the question whether it exists or not may lay in the mouth of the respondent alone. Such cases as *Beattie* v. *Beattie*, [1938] P. 99, in which the petitioner accepted a sum of money from the respondent to cover her costs, show how the legal burden of proof may be discharged although the suspicions of the Court are aroused. For, on the particular facts, the President was satisfied that the petitioner had decided totake divorce proceedings for reasons of her own independently of the inducement offered by her husband. In *Emmanuel* v. *Emmanuel* (*supra*) it was the petitioner's inability to satisfy the Court that her husband had not abandoned a good defence on the merits because of the undertaking as to maintenance which proved her undoing. The soundness of the Court's suspicions could only have been ascertained if the case had been defended, and, although in other branches of the law where judgment by default is not unknown, one may approve the distinction between the legal and provisional burdens of proof, its practical working in divorce may be open to question if the petitioner's chances of discharging the legal burden which is cast upon him are, in a case arousing suspicion, likely to be enhanced by the fact that a suit is defended.

2. *The nature of collusion.* This, however, is but one aspect of the larger problem as to what, in the eye of the Divorce

Court, amounts to collusion. The matter is dealt with in a most interesting way in the judgment of Denning J. in *Emmanuel* v. *Emmanuel* (*supra*). He recognises that the law cannot prevent the parties from making arrangements in contemplation of divorce proceedings, and puts the case of an innocent wife whose husband provides evidence of adultery, offers maintenance and costs, and 'generally does all that he can to persuade her to bring proceedings' ([1945] 2 A.E.R. at p. 495). He concludes that the acceptance of the offer is not by itself collusion, 'if she stoops, however, to accept a bribe, that is collusion, because the Court cannot be sure that she genuinely seeks relief'. The premise of the whole of this part of the judgment is that 'in order to secure the proper administration of the divorce law, the court requires that every petitioner must have received a real injury and genuinely seek relief, and that he shall deal with the court with the utmost good faith' (at p. 495). Few lawyers would deny that this is an admirable summing up of the effect of section 178 of the Judicature Act, 1925, but the real difficulty is to know what, in a given case, amounts to collusion. If it exists, the Court is bound to dismiss the petition, but, on the reported cases, it is submitted that it is virtually impossible for the practitioner to advise whether it does, or will, if a certain course of action is pursued, exist (*Malley* v. *Malley*, 25 T.L.R. 662; *Scott* v. *Scott*, [1913] P. 52; *Laidler* v. *Laidler*, 36 T.L.R. 510).

The duty of dealing with the Court with the utmost good faith, and the knowledge that 'no such agreements are valid without the sanction of the Court, except those made after decree absolute' ([1945] 2 A.E.R. at p. 496), are of no assistance at the inception of divorce proceedings. It is submitted that it is a disgrace to the administration of the law, the soundness of which, in this particular instance, is at least as dependent on litigants and their advisers as it is upon the judiciary, that the standard work on divorce should have to state that 'collusion' is not 'a well-understood term' (*Rayden on Divorce* (4th ed.), p. 130). If, on facts such as those in *Emmanuel* v. *Emmanuel* (*supra*), where there was no stipulation by the petitioner or undertaking by the respondent that the proceedings should be undefended, the Court has to be satisfied as to the reason why what may have been a good defence on the merits was abandoned, the onus on a frank petitioner in an undefended case may be well-nigh insuperable. There is some danger that we may be reverting to the days when it was thought that absence of 'recrimination' might of

itself be evidence of collusion (see citation of evidence given by Dr. Lushington before the Royal Commission on Divorce in 1848 in *Churchward* v. *Churchward*, [1895] P. 7).

3. *Connivance and damages against the co-respondent.* In *Churchman* v. *Churchman* (*supra*) the presumption of innocence, provisional as it may be in divorce, served the petitioner in good stead. His attempts to secure damages had ceased before his petition was presented, so there could be no question of collusion. With regard to connivance, the Court of Appeal were able to apply the case of *Gipps* v. *Gipps and Hume*, 11 H.L.C. 1, in which the House of Lords were unanimous in holding that a compromise of a claim for damages against a co-respondent did not of itself amount to connivance at the respondent's subsequent adultery with him, although the majority took the view that, on the particular facts, an arrangement whereby the first petition for divorce was to be abandoned in consideration of further payments by the co-respondent did have this effect. Furthermore, the Court of Appeal expressly reserved its opinion as to whether the receipt by a petitioner of a sum of money, in pursuance of a collusive bargain as to damages, would, as Lord Merrivale P. appeared to think, amount to connivance at the wife's subsequent adultery (*Gifford* v. *Gifford*, 43 T.L.R. 141).

Churchman v. *Churchman* (*supra*) may therefore prove to be of assistance in cases in which the litigants, while still in a state of blissful ignorance as to section 178 of the Judicature Act, 1925, enter or endeavour to enter into arrangements of their own without legal assistance. However, before leaving the subject of claims for damages against the co-respondent, one may be permitted to doubt whether there is any justification for the retention of section 189 of the Judicature Act, 1925, under which damages for adultery can be claimed by a husband in the Divorce Court. If the common law right to sue in tort for damages for enticement where this exists is adequate for a wife, it is hard to see why it should not suffice for a husband. The possible co-existence of remedies by the latter may give rise to difficulties (*Menon* v. *Menon*, [1936] P. 200) and it is surely curious that the rules as to collusion should apply to the claim under section 189, which apparently cannot be compromised without the approval of the Court, and in relation to which there is no provision for payment into Court, whereas they cannot apply to the claim in tort.

4. *The effect of condonation.* 'Condonation' is a well-understood term, and it is only in relation to the doctrine of

revival that problems are likely to arise (*ante*, Vol. VIII, at pp. 149 *et seq.*). In *Beard* v. *Beard*, [1945] 2 A.E.R. 306, the Court of Appeal by a majority held that desertion for a period of less than the three years required to found divorce proceedings revives condoned adultery so as to render it available as a ground for divorce. To have held otherwise would, in the opinion of Scott L.J. (at pp. 314–5) have been ' socially intolerable '. He concluded that ' the trend of judicial decision from 1730 onwards to the present year has been to uphold the rule that the bar of condonation continues only so long as the matrimonial conduct of the repentant spouse continues to be such as a Divorce Court can accept as consistent with matrimonial duty '. The sociological basis of the dissenting judgment of Vaisey J. is to be found in his doubts (at p. 318) as to the desirability of a law which ' enables a wife or a husband to obtain as of right a divorce from the other in their old age upon the ground of one single act of adultery committed by the other in the time of their far-off youth and immediately condoned, but now raked up from the past upon some petty provocation insufficient in itself to be a ground for the relief so tardily sought '. The legal grounds for his dissent are summed up in his view that ' condoned offences can be revived . . . to complete a picture but not to convict of their own force '.

From the sociological point of view the solution of the problem may be that desertion for a period shorter than that required to found divorce proceedings should suffice to revive condoned adultery or cruelty, but that, after a given period of time, the forgiveness should be deemed to become absolute so that it would not be possible for the condoned offence to be ' raked upon from the past upon some petty provocation '. It is, however, difficult to see how this result could be achieved by the judiciary, and, from the legal point of view, the following criticisms may respectfully be made of the judgments of the majority of the Court of Appeal in *Beard* v. *Beard* (*supra*).

(i) It is historically incorrect to speak of desertion as having been a matrimonial offence in the same sense as adultery or cruelty before the coming into force of the Matrimonial Causes Act, 1857, because it did not, as they did, excuse the petitioner from the performance of matrimonial duties. His willingness to fulfil these was a *sine qua non* of success in obtaining a decree for restitution of conjugal rights reaffirming the continued existence of the marriage tie, while adultery or cruelty discharged the matrimonial obligations and might found a decree for divorce *a mensa et thoro* dissolving the marriage

bond so far as the Ecclesiastical Courts could do so. *Hart* v. *Hart* (1855), 2 Ecc.&Ad. 193, is in fact a decision to the effect that condoned cruelty was not revived by desertion (at p. 200).

(ii) In all the relevant decisions from 1857 onwards it seems that the desertion was of a nature sufficient to found a decree for judicial separation, and it is submitted that this fact was crucial. Thus, in *Price* v. *Price and Brown*, [1911] P. 201 at p. 202, it was said 'Here there has been statutory desertion under section 5 of the Matrimonial Causes Act, 1884. This undoubtedly creates a matrimonial offence, because, under that section, *either party has a right to apply for a decree of judicial separation, on the ground of non-compliance with a decree for restitution of conjugal rights*'. (The italics are the writer's; the case does not appear to have been cited in *Beard* v. *Beard, supra.*)

(iii) The criterion of such conduct 'as a Divorce Court can accept as consistent with matrimonial duty' as that which will suffice to prevent the removal of the bar of condonation is likely to prove difficult to apply. The majority judgments appear to approve *Winscom* v. *Winscom and Plowden* (1864), 3 Sw.&Tr. 380, and *Ridgway* v. *Ridgway*, 29 W.R. 612, in which a wife's amorous association with another man and a husband's solicitation of chastity were respectively treated as sufficient to revive condoned adultery. These are not matters which are covered by any statute, and it may be argued that such offences as wilful neglect to maintain and habitual drunkenness, which come within the Summary Jurisdiction (Separation and Maintenance) Acts, are *a fortiori* sufficient to bring the doctrine of revival into play. Perhaps, therefore, *Beard* v. *Beard* (*supra*), though temporarily solving one vexed problem in a branch of the law where certainty is essential, will come to be regarded as a case which raises more problems than it solves.

To sum up this somewhat lengthy note, it may be said that there is room for reform within the framework of our present divorce laws, which require that 'every petitioner must have received a real injury', by the restriction of the rules as to collusion to cases where there is an agreement not to defend or otherwise to impede the Court in the fulfilment of its duty under section 178 of the Judicature Act, 1925, by a modification in the law as to damages against a co-respondent, and by a precise definition of the wrongs which revive condoned adultery or cruelty. In view of the paucity of appeals in divorce the first and third of these should, as the second must, come from the Legislature rather than the judiciary.

RUPERT CROSS.

TRADING WITH THE ENEMY

The appeal against the decision of the Court of Appeal in *Schering Ltd.* v. *Stockholms Enskilda Bank* was recently dismissed by a majority of the House of Lords consisting of Lords Thankerton, Porter and Goddard, Lord Russell of Killowen and Lord Macmillan dissenting: [1945] 1 A.E.R. 36.

The facts of the case as well as the reasons given in the Court of Appeal by Lord Greene M.R. on behalf of himself, Lord Clauson and du Parcq L.J. were reviewed in 7 (1944) MOD.L.REV. 159 and need not be restated. The net result of the decision reached in the House of Lords may be summarised as follows: public policy does not invalidate a pre-war contract under which a British subject (in the territorial sense) is liable to pay a sum of money to a neutral (in the territorial sense) in discharge of the liability of an enemy, it being irrelevant that payment by the British subject involves not only an assignment by the neutral creditor to the British payor of his claim against the enemy, but also results in a substantial reduction of the enemy's liability.

This result was reached by the Court of Appeal on the ground that there was a distinction between contracts between a British subject and an enemy and contracts between a British subject and a neutral, and that, in the latter case, the outbreak of war invalidated the contract only if the benefit accruing to the enemy was real, while in the present case the benefit was so vague and uncertain as to permit suspension rather than abrogation. This line of reasoning was incidentally rejected by the Law Lords, but, what is more remarkable, it was not even put forward on behalf of the Swedish bank before the House of Lords. The explanation probably lies in the fact that shortly after the Court of Appeal had rendered its judgment, the second edition of Sir Arnold McNair's book on *The Legal Effects of War* appeared, and that the learned author there suggested an argument in support of the Court of Appeal's decision of which Lord Greene's judgment contained little trace, but which appealed to the Swedish bank's counsel and, as it turned out, carried the day. Sir Arnold McNair said (at p. 238) that the clue to the decision was to be found in the fact that the contract was an executed one:—

> The British company had received as long ago as 1936 the full benefit of the contract in the form of an advance of £84,000 by the Swedish bank to a German company of which it was a subsidiary, and all that remained of the

contract was the liability of the British company for the payment of an agreed sum of £54,000 to the Swedish bank by instalments over a period of eight years.

If the facts had been as stated by Sir Arnold McNair, it would indeed not have been open to doubt that the contract was an executed one, and accrued rights are not affected by the outbreak of war, though the right of suing in respect thereof is suspended. Lord Thankerton was incontrovertibly right in saying (p. 41) that ' the effect of the outbreak of war upon contracts legally affected by it is to abrogate or destroy any subsisting right to further performance other than the right to the payment of a liquidated sum of money, which will be treated as a debt and will survive the outbreak of war '.

Was, then, the contract under consideration an executed contract within the meaning of this rule ? The answer depended not on legal principle, but on the facts. The House divided on a very narrow issue. According to the contract payment by the English company relieved the German company of a substantial part of its liability and, also, the English company's obligation to pay was entered into in consideration of the assignment to it by the Swedish bank on the occasion of each payment of a like sterling amount of the Swedish bank's claim against the German company. As regards the latter provision in particular, in the earlier case between the same parties, reported [1941] 1 K.B. 424, at p. 435, Lord Greene had said that the Swedish bank's remedy against the English company was not by action for debt, but by proceedings for specific performance of the contract of purchase, after execution and tender of a proper assignment of the debt the subject-matter of the purchase. Yet, in the view of the majority of the House of Lords, the provision for an assignment made no difference, since it was merely machinery, ' merely incidental to the discharge of the debt ' (*per* Lord Thankerton at p. 41), ' no more than a provision as to the method of payment and perhaps as some additional precaution ' (*per* Lord Goddard at p. 57). And Lord Porter emphasised (at p. 52) that in substance the final bargain was repayment by the English company of the German company's debt, not purchase by the English company of the Swedish bank's rights against the German company.

Lord Russell's opinion deals fully with these and other points made by the majority. In common with Lord Macmillan he failed to see that this very special contract was a simple case of the Swedish bank having an accrued right to a

liquidated sum of money as to which it had nothing more to do than to collect what was due to it. The provision as to assignment gave the arrangement its essential feature, making it a contract for the sale and purchase of a number of choses in action on specified dates.

Lord Russell concluded his forceful opinion with the words:—

> One cannot but regret the unsatisfactory outcome of the argument in this House. The appeal fails for reasons which differ from those which prevailed in the Court of Appeal and which differ *inter se*. To me two decisive points stand out crystal clear, unanswered and, I venture to think, unanswerable: (i) the April contract, if performed in war-time, confers a distinct and immediate benefit on the enemy; and (ii) as regards post-war instalments it was at the outbreak of war wholly executory'.

All will regret that this was one of the last speeches made by Lord Russell of Killowen as a Law Lord prior to his retirement. Many will regret that it failed to prove the last word on the point to be decided. If the majority had not treated the conception of an executed contract as a rigid one, but had allowed it greater flexibility and adaptation to the facts of each case, it would have been possible to avoid a result which, it is believed, runs counter to overriding principles of public policy.

F. A. MANN.

'DOUBLE TAXATION' OF FOREIGN DIVIDENDS

THE expression 'double taxation' in relation to dividends payable by foreign companies to their British shareholders can be understood in two senses. In the first, and more usual sense, it means that the dividend has been subjected to income tax both by the law of the country of foreign incorporation and again under the British income tax code; as respects this form of double taxation, provision for a form of relief has been made by section 49, Finance (No. 2) Act, 1945, and Article VI of the recent Convention between this country and the U.S.A. for 'The Avoidance of Double Taxation', Cmd. 6624 of 1945. In its other, and more restricted sense, the term 'double taxation' of foreign dividends has come to mean—as a result of the sixty-year old decision of the Court of Appeal in *Gilbertson* v. *Fergusson* (1881), 7 Q.B.D. 562—the taxation *in full* of a dividend received by a British shareholder from

a foreign company where part of that company's income, out of which the dividend was payable, has itself borne British income tax either by direct assessment in respect of income arising in this country or by deduction of tax at the source. This note is concerned solely with ' double taxation ' in this latter sense.

In *Gilbertson* v. *Fergusson* a foreign bank had a London agency to which it dispatched moneys to be distributed as dividends to its British shareholders; the agency was, of course, liable to direct assessment in respect of its profits made from trading within this country, but it was also held to be liable to tax in respect of the dividends distributed by it here: see section 10, Income Tax Act, 1853, now rule 7, Miscellaneous Rules, Schedule D, Income Tax Act, 1918. The Court of Appeal held, however, that the charge upon the agency in respect of these dividends must be reduced by the proportion that the bank's profits from trading in this country bore to its total profits, insomuch as the former had already suffered British income tax and were part of the fund out which the dividends were ultimately payable. This overriding principle of revenue law, whatever the statute appeared to say, was laid down thus by Brett, L.J. :—

> Now it may be that there are no specific words which point out that the Government are not to receive tax twice over but it would be clearly unjust and contrary to the meaning of the statute that the Government should have the tax payable twice over *by the same person in respect of the same thing*. . . . Therefore, if part of the dividends in respect of which income tax is payable is also in respect of profits earned from a business in England, the tax on that part would have to be paid twice over, which ought not to be—7 Q.B.D. pp. 569–70.

It must, however, be noted that this case was decided under the now-exploded theory that a company paid tax on its profits *as agents* for its shareholders; the bank's shareholders were therefore regarded as having paid tax, first by a direct assessment upon the London agency's profits and again by way of deduction of tax from their dividends. On the authority of this alleged overriding principle of revenue law, it became the practice of the Revenue authorities, for the following sixty years, to relieve British shareholders of a proportion of the income tax due on their foreign dividends calculated by reference to the aggregate income of the foreign company and the share thereof which had been subjected to British income tax.

In recent years, however, the House of Lords has made it abundantly clear that this identification of shareholders and their company has no place in our income tax code. A company is chargeable to tax on its own profits and pays tax in discharge of *its own* liability—see *Neumann* v. *Inland Revenue*, [1940] A.C. 215, and *Cull* v. *Inland Revenue*, [1940] A.C. 51, noted at 3 MOD.L.REV. 316–7; its shareholders are not *directly* chargeable to income tax on their dividends (*é contra* as regards surtax) although, on payment thereof, the company is entitled to deduct a proportionate amount of the tax therefrom (rule 20, All Schedules Rules, Income Tax Act, 1918).

The first challenge by the Revenue to this alleged principle of ' double taxation ' was in *Barnes* v. *Hutchinson*, [1940] A.C. 81, where the respondent received preference dividends, at a fixed rate, from his holding in an Indian company which itself had received dividends—under deduction of British income tax —from ordinary shares in two British companies. The respondent had been charged under Case V of Schedule D on the *full* amount of his dividend but had successfully contended in the Court of Appeal that, under the rule in *Gilbertson's Case*, he was entitled to be relieved from British income tax proportionately to the parts of the Indian company's income which had and had not suffered such tax. The House of Lords decisively rejected this claim on the simple ground that, under its earlier decisions, *cf. supra*, it was clear that a shareholder's dividend was an income different from that of the company; the respondent had received in full the fixed preference dividend to which he was entitled and therefore could not be said in any way to have suffered British income tax thereon. *Gilbertson* v. *Fergusson* was distinguished on its different facts, *viz.*, the London agency of the foreign bank had itself been *directly* charged to tax.

In *Canadian Eagle Oil Co., Ltd.* v. *R.* and *Selection Trust, Ltd.* v. *Devitt*, [1945] 2 A.E.R. 499, the House of Lords had squarely to face the issue whether, in view of its prior decisions, the rule in *Gilbertson's Case* could be regarded as still subsisting as regards dividends, other than at a fixed rate, received by British shareholders from foreign companies. In the former case the petitioners, a non-resident foreign company not carrying on any trade in this country, paid dividends to its British shareholders through ' paying agents ' here who deducted the full amount of the tax; the company's profits, out of which these dividends were paid, included not only dividends from British companies received under deduction of

tax but also income arising in this country which had been *directly* charged to tax. In the latter case, the appellants were a British company, part of whose income consisted of dividends from American companies whose income in turn was made up of taxed dividends received from British companies.

Although *Gilbertson* v. *Fergusson* had stood as good law for some sixty years, the House of Lords found no difficulty in overruling it upon two grounds. In the first place, its very *ratio decidendi* had completely disappeared since it was now established that the income of a company and the income received from it by its shareholders were two distinct incomes accruing to two distinct persons; accordingly, the fact that the foreign company's income had been in part subjected to British income tax could in no way be said to infer that the dividends received by its shareholders had similarly suffered such tax. In the second place it was beyond the province of the Courts to correct an alleged hardship or remedy an injustice by implications or by overriding principles not based upon the specific language of the statute; there was nothing in the Income Tax Acts from which one could imply any 'general principle' against double taxation. It was also observed that, in any event, British Revenue officials had no power to investigate the constitution of a foreign company's income.

In conclusion it was pointed out that the rule as to deduction of tax at source by a company on payment of dividends (rule 20, All Schedules Rules, *supra*) applied only to British companies. British shareholders of foreign companies were chargeable to income tax on their dividends either by way of direct assessment under Case V of Schedule D, or by deduction of tax under rule 7 of the Miscellaneous Rules, Schedule D, where payment was made in this country through 'paying agents'.

A. FARNSWORTH.

REVIEWS

THE PURE THEORY OF LAW. By WILLIAM EBENSTEIN, Associate Professor of Political Science, University of Wisconsin. (Madison, Wisconsin: University of Wisconsin Press. 1945. xii and 211 pp. $2.50.)

OF the many divergent movements which the present century has seen in the realm of legal theory probably the most important and certainly the most vehemently debated is the doctrine of Hans Kelsen and his followers (the Vienna School), which bears the apt descriptive title of the Pure Theory of Law—*Die Reine Rechtslehre*. As Professor Ebenstein remarks, 'A school of legal thought that can cause intellectual storms from Belgrade to Tokyo has achieved no mean feat'. Even in England and America it has not been ignored; the Introduction to the present volume records some sixteen works in English, mostly articles in periodicals, in which it has been expounded or discussed. (The author has, however, apparently missed the chapter by R. T. E. Latham in Vol. I of the *Survey of British Commonwealth Affairs*, O.U.P., 1937, and also a paper by the present reviewer in *Grundfragen der Rechtsauffassung*, Munich, 1938.) But on the whole it has received 'comparatively little attention' in the common law countries. A glance at the first chapter of the present volume may help to explain this neglect. The legal philosopher, as he exists on the Continent, is a rare creature in England; the pure lawyer, as distinct from the Pure Theorist of Law, has seldom enjoyed an education which comprises a study of Kant's *Critique of Pure Reason* and is impatient of legal writings which cannot be comfortably assimilated without such preliminary philosophical exercises.

Yet, if the English lawyer could overcome this initial difficulty, he would probably find that of all Continental legal philosophies the Pure Theory of Law fitted most congenially to his own traditional way of thinking. This is perhaps another reason why it has received 'comparatively little attention' from him; he finds in its practical and political implications little or nothing to shock his cherished beliefs. Since 1688 he has never doubted the maxim that *Rex debet esse sub lege*; even if he complains of modern bureaucratic tyranny, what he is complaining of is a tyranny formally created by law. The Continental doctrine that the Administration can be above the law, that the administrative act 'carries its own validity', is strange and repulsive to him, and its denial by the Pure Theory of Law awakens in him only the mild approval of one reading a self-evident proposition. Even if, like Salmond, he pays lip-service to the view that the State is the creator of the law, he

does not dream of identifying this meta-legal creator of the law with the administrative entity called 'the State' (or, in English parlance, 'the Crown') which appears as a party to legal proceedings, and of arguing that, this entity being superior to the law, its organs must therefore be exempt from all legal control; he therefore fails to appreciate the importance of Kelsen's onslaught on the traditional German doctrine of the State. Nor is he shocked by the denial that there is any essential distinction between public and private law, for this distinction has never meant very much to him. Legal rights, again, are for an English lawyer the creation of the law; he is puzzled by the vehemence of Duguit's attack on the concept of *droit subjectif* until he realises that to a Continental lawyer *droit subjectif* generally suggests a right in the individual prior to the law; therefore he finds nothing heretical in Kelsen's contention that 'there is only such a thing as a subjective right because and in so far as the objective norm recognises it'. Since Hohfeld (to whom Professor Ebenstein might have referred on pp. 173–4) he has doubted the validity of the absolute distinction between rights *in rem* and rights *in personam* which some of his jurisprudential teachers have imported from Roman law, and it is with no sense of discomfort that he learns that to the Pure Theory of Law the distinction is merely relative. And finally, in treating of the interpretation and application of law, the Pure Theory of Law, in Professor Ebenstein's words, 'arrives at a position which is as revolutionary for Continental jurists as it is a matter of course for American and English jurists: "If legal science wants to be able to say what law is for the individual case, then it must ask the judge"'.

But it is not merely the practical conclusions of the Pure Theory of Law that should be congenial to the English lawyer. Its whole structure is remarkably similar to the analytical jurisprudence taught in his law schools. The Pure Theory of Law would agree with Holland that 'Jurisprudence is the formal science of positive law'. It does not deny the value of ethical, sociological and other methods of study; it simply insists that pure analysis of the form of legal thinking should not be contaminated by the influence of concepts belonging to these other methods. The exposition of the Pure Theory of Law might well adopt Austin's title, 'The Province of Jurisprudence Determined'. It might almost be said to repeat Austin's analysis, but on 'purer' lines, eliminating two foreign elements the impropriety of whose presence Austin had not suspected, namely: (i) the concept of the Sovereign, that is, of certain factual political conditions, as a necessary presupposition of law, and (ii) the concept of factual effectiveness, which was imposed on Austin partly by his doctrine of the Sovereign and

partly by his view of law as a matter of command and obedience, that is, of psychological fact.

To the Pure Theory of Law law consists of normative propositions, to be conceived not as commands addressed to the will of a subject, but as hypothetical propositions whose main verb is not 'Is' but 'Ought'—propositions in the form, 'If X is, then Y ought to be'. 'The Ought here says nothing of the value or absence of value of the facts it relates; it merely expresses their specifically legal connection.' 'The Ought of law is a purely formal category.' (Austin said this in his own terminology when he said, 'Command and duty are correlative terms. . . '.) The lawyer's task is simply to consider the interrelations of the various propositions of this kind which make up a system, and, in particular, to determine the validity of each with reference to the appropriate higher norm, until he reaches the highest (or basic) norm upon which the validity of the whole system depends. For purely legal thought this basic norm can only be postulated: any attempt to justify it (as Austin did by tying it to the factual existence of a Sovereign) is outside the province of legal thought properly so-called. Essentially there need be only two stages in the legal process—the basic norm and the application of compulsion to the subject (as when an absolute ruler, acting under the basic norm that the ruler's will is law, inflicts punishment with his own hand)—but usually there are several (*e.g.*, basic norm defining the supreme legislator—statute passed by the legislator—administrative regulation under the statute—judicial decision on the application of the regulation to a particular case—order for enforcement of the decision—application of constraint to the individual), each, after the first, involving an act of will and therefore, in its own degree, of law-making. This part of the Theory is called in German the *Stufenbau des Rechts*, a phrase not very happily translated in the present work as 'the Steps-and-Stairs Theory of the Law'. It enables the Pure Theory of Law to avoid on the one hand the tendency of most Continental jurists to concentrate on the part played by statute in the making of the law, and on the other hand the tendency of American 'realists' to concentrate on the part played by the judge. It also helps us to see (cf. pp. 160–161 of the present work) that political theory falls into error when it looks only at the constitution of the Legislature as the ground for classifying the constitutions of States. 'The form of State can be determined only by an analysis of the law-making stages above and below that of statute.'

Professor Ebenstein will perhaps pardon us for saying so much about his subject and so little as yet about his treatment of it. After all, the object of his book is not to put forward

his own ideas but to expound a body of received doctrine. This he has done with fidelity and sincerity. His knowledge of the classic writings of his school cannot be questioned, and he shows an extensive acquaintance with other writers, English and American, as well as Continental, whose outlook has points of similarity or of significant contrast to that of his masters. His work may well become for English readers the standard exposition of the Pure Theory of Law. But, having paid tribute to its substantial merits, we may permit ourselves a few criticisms. The difficulty which the average English reader will find in the philosophical approach has already been mentioned; but this is inherent in the study of all Continental legal theory. The difficulty, known to every translator, of dealing with the German word *Recht* has not been overcome (see especially pp. 162–165). One grants the difficulty of giving a clear and systematic exposition of a far-reaching theory—the expositor must explore side-issues and introduce parenthetic comment and notes of comparison—yet the Pure Theory of Law is remarkably coherent and systematic, and one cannot help feeling that a little rearrangement of his material, and perhaps even the exclusion of some points, would have made Professor Ebenstein's exposition clearer. For instance, the important point that the Pure Theory of Law is to be compared with Kant's epistemology rather than with his ethical teaching is nearly made on p. 18 and again on p. 27, but it emerges into the full light of day only when, after touching on many other matters, we reach pp. 87–88, and the rejection of factual effectiveness as a test of legal validity, although it fits well enough where it comes in the study of legal positivism on pp. 111–112, might find itself even more at home in Chapter II, which is mainly devoted to showing how the Pure Theory of Law rejects various non-legal elements. And, while all Kelsen's writing about natural law is interesting and valuable, so much of it as is not concerned with the distinction between natural law and positive law might be regarded as not strictly relevant to the exposition of the Pure Theory of Law.

On p. 53 we are promised that a detailed study of Verdross's ideas and an estimate of his position in the school will be given later. The Index does not contain any reference to Verdross later than p. 53. Search of the text discovers some four or five later references, but none that can reasonably be said to amount to the promised study in detail. This is not the only fault of the Index. The references in the text to, *e.g.*, Del Vecchio on p. 201 and Weyr on pp. 135 and 172, are not mentioned in the Index, and a number of the references in the Index, especially to the later pages of the text, are incorrect, *e.g.*, Cole p. 144 should be p. 143, Goodhart p. 203 should be p. 201, Laski p. 206 should be p. 204, and Salmond p. 205

should be p. 203. We have also noted a good handful of misprints in the text and (on pp. 185 and 193) the gratuitous repetition of whole lines. These are blemishes on a serious and valuable work.

A. H. CAMPBELL.

LEGAL AID. By ROBERT EGERTON, M.A., LL.B. (London: Kegan Paul, Trench, Trubner & Co., Ltd. 1945. xvi, 160 pp. 10s. 6d. net.)

THE average middle-class Englishman is very self-satisfied about the administration of justice in England. He knows vaguely that it is a bit expensive, but believes that good things are never cheap, and since he seldom or never bumps up against the law, save when, perhaps, he forgets to switch on the sidelights of his motor car, he does not realise that to the majority of his fellow-citizens this expense has very nearly meant in fact a denial of justice. Occasionally he may see quoted the late Lord Darling's remark that like the Ritz Hotel justice is open equally to the rich and to the poor, but since this is obviously intended to be funny he does not appreciate that there can be a truth in it.

Ignorance of one's neighbour's life and fortune is typical of middle-class life under a capitalistic regime, and up to a point is understandable. For a Government, however, whose job it is to know the conditions under which social solidarity is to be attained ignorance is inexcusable. The charge against British Governments, and particularly against those who held power in the period between the wars, in connection with the denial of justice to the less well-off sections of the community is more than that of ignorance, it is one of sin, the sin of deliberately neglecting to take the steps clearly necessary to provide even a stop-gap solution to the problem.

No one could read the well-documented and temperate account of the matter given by Mr. Egerton in this book without a feeling of shame, not only at a record so deplorable in itself, but that this country, and indeed the whole British Empire, with the honourable exception of Australia, should be so far behind almost all other civilised communities in respect of provision for the assistance of poor people in their legal difficulties.

Mr. Egerton provides a careful though not too detailed account of the at best niggling and often reactionary steps taken on the advice of committees presided over by distinguished judges such as P. O. Lawrence and Lord Finlay. Here, where there was no strong public opinion to spur the governing

classes along, one gets a real insight into the amount of social security which a profit-dominated society will voluntarily provide for the weaker brothers. Poor people must not be assisted to get their just claims remedied lest they develop a taste for litigation, thought the Finlay Committee. The Lawrence Committee reported that the only effective way of making provision for poor persons was to hand the whole matter over to the legal profession, and in order that it might remain on a proper basis of Victorian charity the lawyers were to undertake the work gratuitously. That real and substantial help was given, though clearly only a small fraction of what was required, proves that there is a bigger streak of altruism in the legal profession than it is usually given credit for.

Typical of the whole system are the facts that though the county court with jurisdiction up to £200 is par excellence the poor man's court (for civil litigation) no provision for assistance has ever there been made. Nor has any official provision ever been made, apart from that developed in the armed forces during the war for morale purposes, for providing the essential advice without which rights may be lost before litigation is thought of.

In the domain of criminal law the record has been rather better, especially since the Poor Prisoners' Defence Act, 1930, enabled a defence certificate to be granted whenever ' desirable in the interests of justice ', but it has not sufficiently been acted upon.

Happily it looks as if this bad era were drawing to a close. The recent report of the Rushcliffe Committee [1] makes recommendations of a really liberal character which when implemented, as has already been promised by the Government, will make as satisfactory provision as is feasible outside a nationalised legal system. The value of Mr. Egerton's book appears from the close way in which his proposals have anticipated those of the Rushcliffe Committee. Where he differs, *e.g.*, in not wishing to give the legal profession complete control over the administration of the scheme, the present reviewer's sympathies are very much with him.

In his Appendices Mr. Egerton provides detailed particulars of the provision made for legal aid in all the large towns of England and Wales, and also gives a summary of the arrangements made in foreign countries. The Rushcliffe Report has by no means made Mr. Egerton's work obsolete, and its value will be readily appreciated by all those interested in this important subject. They cannot afford to miss it.

CHORLEY.

[1] Cmd. 6641.

MATRIMONIAL CAUSES. By S. SEUFFERT, Barrister-at-Law. Second Edition. (London: The Solicitors' Law Stationery Society, Ltd. 1944. xvi, 90, (index) 13 pp. 10s. 6d. net.)

THIS is the second edition of the author's commentary on the Matrimonial Causes Act, 1937. The first edition was published before the Act itself had come into operation and, in the author's own words, his original notes on the Act were therefore inevitably 'sketchy and many of them speculative'. This can certainly not be said of the new edition, which is admirably concise and complete. It embodies all the judicial decisions on the Act and the leading decisions on divorce law generally in compressed and accurate notes arranged behind each appropriate section of the statute. The book also contains the Matrimonial Causes Rules, 1944 (with some notes) and, in an appendix, relevant parts of other statutes dealing with matrimonial matters.

The notes, which are the main contribution of the book and add up to twenty closely-printed pages, are so good—all the dead timber, which overburdens and obscures so many textbooks, is omitted—that one cannot but regret that the author confines his commentary to the Act of 1937 and does not extend it to the statutes set out in the Appendix. Does not the title 'Matrimonial Causes' legitimately cover the Summary Jurisdiction (Married Women) Act, 1895, and so on? Perhaps not—but an enlargement of this book along its present lines to cover the whole field of matrimonial statutes may be something to look forward to in future editions.

In the meantime, this work can be warmly recommended to practitioners and (advanced) students alike. There is no better and more up-to-date guide to the Matrimonial Causes Act, 1937.

H. B. GRANT.

CITIZENS' ADVICE NOTES. The National Council of Social Service. (£2 2s. net.)

THESE notes provide, in compact form, a useful summary of war-time legislation as it affects the ordinary citizen. The book is in loose-leaf form and supplements with appropriate indices are issued from time to time.

The notes are not, nor do they purport to be, a legal textbook, though they would undoubtedly be of great assistance to any member of the profession who is conducting a Poor Man's Lawyer Centre. In one sense they go further than a law book, because they give a mass of useful information which, though not of a legal nature, will assist the ordinary citizen in ascertaining what his rights and duties are. Lists of useful

addresses, such as Petroleum Offices, Liabilities Adjustment Offices, Appointments Offices, Refugee Committees, etc., are an excellent feature of the publication.

The main sources of the notes are statutes, Statutory Rules and Orders, Government Circulars and Stationery Office publications, and Hansard. Relevant material on each subject is collected in potted form from the available authoritative sources. Anyone who wants to get married, join a pig club, change his grocer, buy a petrol lighter or run a house-to-house collection for charity will find some useful guidance in the notes, which cover a very large part of the average citizen's daily activities and problems. The notes are not rigidly limited to war-time legislation, and, where necessary, the pre-war position is considered.

The book is, of course, bound to suffer from the difficulty of keeping pace with new statutes and subordinate legislation, and possessors of the notes would do well to keep them annotated from week to week by noting the effects of new legislation on the blank pages, of which there are a number.

Another difficulty with which the editors of the notes have evidently been faced is shortage of space. To compress so much material into one volume inevitably means that some of the notes are rather jejune. Indeed, the task of summarising, for example, the Rent Restrictions Acts in the space of a few pages is one which, one feels, had better not have been attempted. Although there are warnings that on points of legal difficulty a solicitor or Poor Man's Lawyer Centre should be consulted, there is some danger that, unless intelligently used, such potted law may be misleading.

Incidentally, the addition of some detailed information about Poor Man's Lawyer Centres would be a great asset, as also a note about Poor Persons' Committees of Provincial Law Societies. The work of the Poor Persons' Committee of the Law Society should, I think, be dealt with under a separate heading, and not a mere postscript to the subject of divorce.

Nevertheless, in spite of the drawbacks inevitable in a publication of this kind, there is no doubt that the notes are extremely well done, and will be of great value to Citizens' Advice Bureaux, Welfare Officers, and Poor Man's Lawyer Centres.

K. M. JAFFEE.

REQUISITION IN FRANCE AND ITALY: THE TREATMENT OF NATIONAL PRIVATE PROPERTY AND SERVICES. By MAURICE K. WISE. (New York: Columbia University Press. 1944. viii and 207 pp. $2.75 net.)

THIS is a book of a strictly descriptive character. It deals with the methods employed in France and Italy to secure

property and services for the satisfaction of such urgent needs of the State as arise chiefly in war or other periods of emergency. In the case of either country the author describes the power of requisition and, in particular, the occasions for its exercise; the objects of requisition; the exercise of the requisitory power (authorities with power of requisition, procedure, etc.); and the right to indemnity. The material has been painstakingly collected and will no doubt be useful for those engaged in broader studies of comparative administrative law.

F. A. MANN.

PALMER'S PRIVATE COMPANIES. By J. CHARLESWORTH. Thirty-ninth Edition. (London: Stevens. 1945. viii, 100 pp. 2s. 6d. net.)

THE editing of this valuable little book is now in the capable hands of Dr. Charlesworth who, in his preface, discusses the bearing of the Cohen Committee's Report on private companies. He has added useful sections on the Liabilities (War-Time Adjustments) Acts, 1941 and 1944, which apply to private companies, and also on the important topic of income tax in relation to private companies. It is good to see that so much can still be given for 2s. 6d.

CHORLEY.

PUBLICATIONS RECEIVED

DEATH DUTIES. Consolidated Second Supplement to the Ninth Edition. By ROBERT DYMOND. (London: The Solicitors' Law Stationery Society, Ltd. 1945. 2s. 6d.)

BANKRUPTCY TREATISES. By KURT H. NADELMANN. Reprinted from the UNIVERSITY OF PENNSYLVANIA LAW REVIEW. Vol. 93, No. 1. September, 1944.

ARBITRATION IN INTERNATIONAL CONTROVERSY. By FRANCES KELLOR and MARTIN DOMKE. Issued by the Commission to Study the Organisation of Peace and the American Arbitration Association.

WESTERN HEMISPHERE CONTROL OVER ENEMY PROPERTY: A COMPARATIVE STUDY. By MARTIN DOMKE. Reprinted from LAW AND CONTEMPORARY PROBLEMS. (Durham: Duke University Law School.)

HARRISON'S DEATH DUTIES. Supplement. (London: Sweet & Maxwell, Ltd. 1s. net.)

"COMMON-SENSE"—TO-DAY. By KURT LACHMANN. (London: Torchstream Books. 2s. 6d. net.)

INTERNATIONAL ARBITRATION JOURNAL. Vol. 1, No. 1. April, 1945.

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COUNCIL AND COURT OF THE UNITED NATIONS

THE end of actual fighting, the highly destructive effects of the war coupled with the future possibilities of the newly invented atomic bomb, and the wide publicity given to the recently established United Nations Organisation, have focused public interest on society's main problem—namely, the preservation of peace. It is in line with man's longing for an enduring peace that his ardent hopes are directed toward the United Nations.

Obviously, neither a State constituted by its own national legal order, nor the international community established in accordance with the norms of the international legal order, can give an *absolute* guarantee of peace. The fact that the doctrine *pacta sunt servanda* is universally accepted as the basis of all conventional law cannot be interpreted as an unlimited assurance that this axiom will never be violated. Within the restrictions set by human desires and propensities it is quite possible, however, to examine the meaning and significance of the United Nations Charter in connection with the avowed purpose of the United Nations, namely, ' to save succeeding generations from the scourge of war '.[1]

It would be a mistake to underestimate the role which the General Assembly can play in the pacific settlement of disputes. In spite of the fact that this organ of the United Nations will lack the power of enforcement, it can offer all nations an international forum in which to voice their agreements as well as their differences. This much-belittled ' glorified debating society ' may well become the most effective instrument in the strengthening of peace. It will be necessary, however, to turn to the Security Council and the International Court of Justice once the ' discussions ', ' considerations ', or ' recommendations ' of the General Assembly should not have produced the desired effects.

While the promotion of international understanding will

[1] Charter of the United Nations together with the Statute of the International Court of Justice, Preamble, in Department of State, Publication 2353, Conference Series 74, p. 1.

mainly be within the competence of the General Assembly, it is certain that the task of maintaining the peace—and that includes the element of force—will be reserved only to the Security Council and the Court of the United Nations. The cardinal question, therefore, is: Can the international lawyer, prepared to base his answer on a legal interpretation of the United Nations Charter, consider its relevant stipulations as adequate and effective with regard to the maintenance of peace and security?

In this connection, it should be noted at the outset that the Preamble of the United Nations Charter solemnly emphasises the determination of the 'Peoples of the United Nations . . . to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained . . . '.[2] A similar statement can be found in Article 1 of the Charter which refers specifically to the adjustment or settlement of international disputes 'in conformity with the principles of justice and international law'.[3] It is obvious that the framers of the United Nations Charter did not intend to base the relations between States solely on the rules of positive international law since they included, apparently as equally valid, the precepts of justice; and it is not by mere accident that the term 'justice' is given precedence to the term 'law', since the centre of gravity with regard to decisions concerning the enforcement of peace will be the Security Council and not the International Court of Justice. The Security Council as a political body, however, will mainly apply 'justice' while reserving the administration of international law to the International Court of Justice.

Justice and law may be considered as expressions related to norms of social orders which try to induce man to either behave in a socially desirable way, or to abstain from acts considered as socially undesirable. If defined in this sense it is quite possible that both justice and law can produce the anticipated effects. They are not necessarily incompatible with each other. The fact that the United Nations Charter mentions *justice* quite separately from *law* permits, however, the interpretation that the former and international law must not always be considered as synonymous terms; and there is little doubt that if and when 'justice' should come in conflict with 'law' the Security Council will be empowered to apply the former, namely, justice.

[2] *Ibid.*, Preamble.
[3] *Ibid.*, Chapter I, 'Purposes and Principles', Art. 1, s. 1.

Unfortunately, there exists no universal understanding as to the exact meaning of the term ' justice ', since this expression refers to subjective moral standards which differ not only with individuals but also with space and time. What is believed to be ' reasonable and just ' by one person, in a certain place and at a certain time, may very well be rejected by another individual as ' unreasonable and unjust '. In the absence of a general agreement concerning its meaning and substance it would be erroneous and highly confusing to consider ' justice ' as an ascertainable and applicable part of positive international law. Justice, once a dispute between States has arisen, is nearly always claimed to be on the side of each one of the disputants; and it is nearly always used for the *justification* of political claims which cannot be supported by existing rules of positive international law. Applied with regard to the powers of the Security Council, justice can certainly mean that governments, if they choose to do so, may reserve to themselves the ' sovereign right ' to base some of their decisions or actions not on the existing norms of international law but on considerations of political expediency. If this interpretation is correct, one would be constrained to admit the possibility that future relations between States, when conducted along notions of justice, might well come in sharp contrast with one of the main purposes of the United Nations, namely the maintenance of international security.

In contradistinction to the moral or political elements of justice, positive law—national as well as international law—is based on the objective standards of a coercive social order, the rules of which are more easily ascertainable in modern society since Courts or other constitutionally authorised agencies can impartially decide whether or not a claim is based on existing law. If understood in this sense, the application of law will not be based on the uncertain and ever-shifting notions of political expediency. It will advance peace and security far better than justice.

It is quite possible—in fact, it is very likely—that a decision of the Security Council as to whether or not a dispute constitutes a ' threat to the peace, breach of the peace, or act of aggression ',[4] will be made solely in accordance with notions of justice, *i.e.*, political expediency, rather than in conformity with the norms of positive law; and it is certainly conceivable that a political agreement reached by the Security Council could

[4] *Ibid.*, Art. 39.

be in flagrant violation of existing rules of international law. Since Article 39 of the United Nations Charter can be invoked at any time if an affirmative vote of seven, including, of course, the permanent members of the Security Council, can be reached, it may be feared that future relations between States will be based rather on political power than on law. It should be noted in this connection that once a political agreement under Article 39 has been reached, the Security Council may apply economic and military sanctions in accordance with the provisions of Articles 41 and 42.[5] There is good reason to believe that political considerations might, at some time or another, induce the Security Council to disregard the possibilities of judicial settlement by the International Court of Justice, even if one or more parties to a dispute should be prepared to accept the competence of the Court. In order to avoid the jurisdiction of the International Court of Justice it will only be necessary for the Security Council to invoke Article 39. Instead of declaring that 'the continuance of the dispute is in fact likely to endanger the maintenance of international peace and security' as provided for in Article 37, and by so doing to open the way to judicial settlement, the Security Council can, at any time, decide that a dispute constitutes a 'threat to the peace'. Such a course, however, is bound to undermine the most primitive foundations of security and confidence, without which peace cannot endure.

The distinction between justice and law has also been applied very consistently with regard to the jurisdiction of the International Court of Justice. The United Nations Charter stipulates that only 'legal disputes should as a general rule be referred by the parties to the International Court of Justice. . . .'[6] A careful examination of the foregoing provision will reveal that so-called 'political disputes', *i.e.*, disputes based on notions of 'justice' rather than of law, are *ipso facto* excluded from the jurisdiction of the Court. Unless the governments at variance agree to submit to the Court the preliminary question whether or not their dispute is a legal one, and therefore within the jurisdictional competence of the Court, the power to make this fundamental decision will rest with the disputant governments themselves. If deductions from past experience are permissible, it is very unlikely to expect that governments will permit contentious questions of vital national interest to be classified as 'legal disputes'. The differentiation

[5] *Ibid.*
[6] *Ibid.*, Art. 36, s. 3.

between 'legal' and 'political' disputes, however, is detrimental to the application of objective standards in the relations between States, since it will—in nearly all circumstances—favour the country that has violated international law, or intends to do so in the future. It is exactly by declaring a dispute a 'political' one, and by withdrawing it therefore from the jurisdiction of an impartial Court bound to administer the rules of positive law—it is exactly by such an attitude that the notion of international security can be destroyed, since such an act is likely to favour the international wrongdoer, and to shatter the faith of nations in the only existing objective standard of 'justice' applicable to all, namely, law. It is true that the United Nations Charter does not bar States from concluding specific treaties, by which they agree to submit to the compulsory jurisdiction of the International Court of Justice both legal as well as political disputes; but one may consider it as unlikely that governments, and especially those of the larger States, will avail themselves of these opportunities. Hence, one is constrained to admit that the differentiation between legal and political disputes will greatly reduce the importance of the proposed Court as an effective organ for the pacific settlement of international disputes.

It remains, then, to determine whether the International Court of Justice will be given the undisputed right of jurisdiction in the much narrower domain of so-called 'legal' disputes. It is, however, certain that even with respect to 'legal' disputes the Court will lack compulsory jurisdiction. In order to appreciate the far-reaching emasculation of the Court's competence, it is only necessary to analyse the statute of this 'principal judicial organ of the United Nations'[7] in connection with Chapter VI of the United Nations Charter, dealing with the 'Pacific Settlement of Disputes'.[8] It is stipulated there that States having failed to settle a dispute peacefully by means of their own choice shall refer it to the Security Council,[9] which in turn shall decide whether or not the continuance of the dispute in question is, in fact, likely to endanger the maintenance of international peace and security.[10] While it is true that decisions under Chapter VI will be facilitated by the stipulation of the Charter, which prevents from voting any party to a dispute, even if it should be a permanent Member of the

[7] *Ibid.*, 'Statute of the International Court of Justice', Art. 1.
[8] *Ibid.*, Arts. 33–38.
[9] *Ibid.*, Art. 37, s. 1.
[10] *Ibid.*, Art. 37, s. 2.

Security Council, it is not certain that an affirmative vote of seven members will be reached in every case. Without such a vote no decision of the Security Council is possible. It should be remembered, however, that actions or recommendations in accordance with the provisions of Article 37, section 2, are conditioned by a previous declaration of the Security Council that the continuance of a specific dispute is, in fact, likely to endanger the maintenance of international peace and security. It is to be noted that even if such a preliminary agreement among seven nations represented in the Security Council can be reached, the latter is not bound to 'recommend' that 'legal' disputes should be settled by the International Court of Justice, since any other action considered appropriate for the settlement of the dispute may be suggested.

It is, of course, feasible to base a more optimistic appraisal of the Court's future role on the hope that governments will 'recognise as compulsory *ipso facto* and without special agreement'[11] the jurisdiction of the Court in all legal disputes concerning:—

(a) the interpretation of a treaty;
(b) any question of international law;
(c) the existence of any fact which, if established, would constitute a breach of an international obligation;
(d) the nature or extent of the reparation to be made for the breach of an international obligation.[12]

Such agreements were concluded by a great number of States before this war.[13] It would be erroneous, however, to speak with respect to the so-called 'Optional Clause' and the special agreements based thereon, of a 'compulsory jurisdiction' in the true sense of the term, since 'political' disputes are not within the competence of the Court. The text of the various agreements concluded before this war with respect to compulsory jurisdiction of 'legal' disputes, furthermore, indicate that many States then restricted the already limited jurisdiction of the Permanent Court of International Justice by additional reservations.[14] It is doubtful whether governments will be inclined to give the International Court of Justice wider powers of jurisdiction than they were disposed to grant its great predecessor, the Permanent Court of International Justice.

[11] *Ibid.*, 'Statute of the International Court of Justice', Art. 36, s. 2.
[12] *Ibid.*
[13] Manley O. Hudson, *The World Court, 1921–1938*, Boston, 1938, pp. 30–31.
[14] Hudson, *op. cit.*, pp. 32–57.

The foregoing will reveal that it is quite possible to by-pass the International Court of Justice, even in the case of a so-called legal dispute. This interpretation is in full accord with the principles of the United Nations Charter, which declares 'justice' an equal partner of 'international law'. It is true, however, that Article 37, section 2, of the United Nations Charter confers upon the Security Council the right to take action in conformity with the stipulations of Article 36, section 3, permitting the Security Council to 'take into *consideràtion** that legal disputes should *as a general rule** be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court'.[15] Obviously, this section contains no mandatory provisions; on the contrary, it does not exclude the possibility that a dispute, even if agreed by the parties to be a legal one, will not be referred to the Court if, for *considerations** of an extra-legal nature, it should be regarded as more expedient to submit the matter to the Security Council. Such action may well be encouraged by the provision that legal disputes are to be submitted to the Court only 'as a general rule', a stipulation which, as it appears, permits any number of exceptions from this 'general rule' if a government or a majority of States in the Security Council should find it politically desirable to withhold a dispute from the jurisdiction of the Court.

It is quite possible, however, to assume that a certain number of legal disputes will be decided by the International Court of Justice.[16] What, then, are the provisions for the execution of the Court's verdict? No answer to this vital question can be found in the Statute of the Court. But Article 94, section 2, of the United Nations Charter provides for recourse to the Security Council should a party to a case fail to execute the Court's judgment; and it is stipulated that the Security Council 'may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment'.[17] The foregoing provisions clearly indicate that the Security Council is not legally bound to take any

* Italics mine.

[15] *Ibid.*, Art. 36, s. 3.

[16] It is in this connection of no importance that the Members of the United Nations may entrust 'the solution of their differences to other tribunals by virtue of agreements already in existence or which may be concluded in the future'. (Art. 95 of the United Nations Charter.)

[17] *Ibid.*, Art. 94, s. 2, which states, 'If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment'.

THE LAW REFORM (CONTRIBUTORY NEGLIGENCE) ACT, 1945

> Thus
> Was justice ever ridiculed in Rome:
> Such be the double verdicts favoured here
> Which send away both parties to a suit
> Nor puffed up nor cast down—for each a crumb
> Of right, for neither of them the whole loaf.
> (*The Ring and the Book*, ii, 747—752).

Thus Robert Browning: and from his lines we may perhaps gather what he would have thought of the Law Reform (Contributory Negligence) Act, 1945. But then, Browning was not a lawyer, or he could not have supposed that one party to a suit must necessarily be wholly in the right and the other wholly in the wrong. The new Act endeavours to reflect in terms of legal result the fact that in the world as we know it damage may be caused by the fault of both parties. It thus relieves the hardship caused by the common-law rule under which one of two negligent parties might emerge from the accident penniless while the other went unscathed. Even if nature left the loss equally distributed between the parties, the result of the last-opportunity rule at common law might be to pile the whole upon one of them; and perhaps the Act remedies this too. The advantage of the Act is not only that it enables the loss to be apportioned in accordance with ordinary ideas of fairness, but also that, by rendering possible the division of loss between two pairs of shoulders, it makes the loss in appropriate cases easier to be borne.

The present note will fall into two parts. It will first discuss the question whether the Act has delivered us from the last-opportunity rule, and will then make some specific comments upon the wording of the Act.

I

In general terms the object of the Act is to enable the Judge in cases of contributory negligence to apportion the damages between the parties according to the respective degrees of responsibility for the damage. Thus if either sues

the other he will get such damages as are attributable to the other party's portion of the responsibility.

A simple illustration will make this clear. Suppose that A and B are involved in an accident, through the negligence of both, and A suffers £500 damage while B suffers £100 worth of damage. It is held that A's responsibility for the damage amounts to four-fifths and B's to one-fifth of the total, that is to say, that A's responsibility is four times that of B's. Then A will recover from B one-fifth of his damages, amounting to £100, and B will recover from A four-fifths of his damages, amounting to £80. Thus on balance B will owe A £20 in respect of damages. Reviewing the situation, and leaving costs out of account,[1] it will be seen that A suffers his original £500 damage less the £20 received from B, = £480, while B suffers his original £100 damage plus the sum of £20 paid to A, = £120. Thus A's loss is four times that of B, which reflects the Court's assessment of the responsibility for the situation.

In cases where the Court cannot assess the degrees of responsibility—cases of ' inscrutable fault '—there will probably be equal apportionment.

The operative provision of the Act is in the first part of section 1 (1), which runs as follows:—

> Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the Court thinks just and equitable having regard to the claimant's share in the responsibility for the damage.

The construction of this provision is a matter of some difficulty, chiefly on account of the state of the common law before the Act. It is proposed to examine the common law very briefly in order to explain how the difficulty arises.

The general principle of the common law established by *Butterfield* v. *Forrester* (1809)[2] was that if the damage was caused by the fault of both parties, neither could recover from the other. ' In the place where the tree falleth, there it shall be.' This may be called for convenience the stalemate rule, because it resulted in a drawn game.

[1] See as to costs *Jay & Son* v. *Vecvers, Ltd.*, [1946] 1 All E.R. 646.
[2] 11 East 60.

The stalemate rule worked hardship where one of the two negligent parties had sustained the whole of the loss although his negligence was not the major cause of the accident. Accordingly the rule was modified by a second rule, known as the doctrine of last opportunity—in the United States as the doctrine of the last clear chance and in Canada as the doctrine of ultimate negligence—under which the plaintiff was allowed to recover, notwithstanding his own negligence, if upon the occasion of the accident the defendant could have avoided the damage while the plaintiff could not. This rule is usually attributed to *Davies* v. *Mann* (1842),[3] though it had been laid down four years before, in rather careless language, in *Bridge* v. *Grand Junction Ry.* (1838).[4] In course of time it came to be modified in certain ways, particularly by the doctrine of *Loach's Case*[5]; indeed, it seems that *Loach's Case*, on one interpretation, wholly supersedes the last-opportunity rule in favour of a rule of 'greater fault'.[6] In the following discussion we shall let these complications pass, and the rule will be considered as a rule of last opportunity and nothing else.

As we have seen, the last-opportunity rule was designed to mitigate the hardship of the stalemate rule, and it needed no justification other than that. But unfortunately, in order to relate it to existing legal principles Judges sometimes spoke as though it rested on the law of causation or remoteness of damage. Thus Lord Denman, in his dissenting judgment in the Exchequer Chamber in *Radley* v. *London and North Western Ry.* (1875),[7] said: 'I think it was quite open to contend that the plaintiffs, through their servants, were guilty of negligence in leaving that wagon unattended during so long a time as they did, but it . . . was not negligence which in any sense caused the accident . . . [The cause of the accident] was entirely the affirmative act of the defendants' servants, in charging the bridge as they did.' Regarded as a proposition of fact (that is to say, interpreting the word 'cause' in its ordinary popular and scientific sense) this is untrue. It will be remembered that in *Radley's Case* the facts were that the servants of the plaintiffs, whom we will designate by the symbol N1—indicating that they were

[3] 10 M. & W. 546.
[4] 3 M. & W. 244.
[5] [1916] 1 A.C. 719.
[6] M. M. MacIntyre, 'The Rationale of Last Clear Chance' (1940), 53 H.L.R. 1225, reprinted in (1940), 18 Can.B.Rev. 665. Nevertheless Lord Sumner, in *Loach's Case* (at p. 727), said that 'the question is not one of desert or the lack of it, but of the cause legally responsible for the injury'.
[7] L.R. 10 Ex. at 108–9.

responsible for the first act of negligence,—had left a broken truck upon another truck, the combined height of the two trucks being greater than that of the plaintiff's bridge over the line. An engine driver employed by the defendants, whom we will call N2, had negligently forced the combined trucks against the bridge and broken it. On such facts it is simply untrue to say that the negligence—*i.e.*, the negligent act—of N1 was not 'in any sense' a cause of the accident. But for that act the accident would never have happened, and the act was therefore, at the very least, a *causa sine qua non*. Causation in its wide sense implies what has been well called a cone of causation receding back in time, and clearly N1's act of negligence fell within this cone. However, it is not all causes that are regarded by the law, and what Lord Denman must have meant is that N1's act was not a cause for legal purposes, or, as the point may better be expressed, was too remote a cause in law. It was too remote because N2 had the last opportunity of avoiding the accident. On this view, the last-opportunity rule becomes a branch of the law of causation or remoteness. On appeal to the House of Lords, however, although the decision of the Court below was reversed and the net effect of Lord Denman's dissenting judgment was affirmed, his reference to causation was not repeated. Lord Penzance, who delivered the only full speech, contented himself with saying that 'though the plaintiff may have been guilty of negligence, and although that negligence may, in fact, have contributed to the accident, yet if the defendant could in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him'.[8] It will be seen that this language merely states a rule of law, without reference to causation, under which the plaintiff is allowed to recover.

Many cases after *Radley's Case* base the last-opportunity rule on a theory of causation, but in none of them (except possibly certain Admiralty and Privy Council cases, to be noticed later) was the legal basis of the rule directly in issue, so that all these pronouncements may be regarded as *obiter*. Perhaps the strongest *dictum* is that of Lord Atkin in *Caswell* v. *Powell Duffryn Associated Collieries, Ltd.* (1940).[9] Lord Atkin used the causation theory to justify the conclusion that the defence of contributory negligence applied to actions for breach of statutory duty. 'I find it impossible', he said 'to divorce

[8] (1876), 1 App.Cas. 754 at 759.
[9] [1940] A.C. 152 at 164–5.

any theory of contributory negligence from the concept of causation.' The actual decision is, however, capable of being supported without reference to this theory. It may perhaps be added, with the utmost respect, that Lord Atkin's analysis of the situation hardly shows that very learned Judge's usual acuteness. Thus he declared that the negligence of the plaintiff in *Butterfield* v. *Forrester* was the sole cause of the accident that happened. This it obviously was not. Indeed, nothing in nature has a sole cause. If in *Butterfield* v. *Forrester* the defendant had not negligently left the pole across the road, no injury would have been sustained by the plaintiff. The defendant's negligence was therefore a factor contributing to the accident. Causation, in the ordinary meaning of the term, is not the same either as the legal rules of remoteness of damage or as the legal doctrine of last opportunity.

We may now consider the bearing of the new Act upon the common-law position. The combined result of the stalemate rule and the last-opportunity rule at common law may be stated in three propositions.

(1) Where neither plaintiff nor defendant had the last opportunity of avoiding the accident, the plaintiff fails. (It will be remembered that refinements on the doctrine of last opportunity, such as the rule in *Loach's Case*, are here being omitted for the sake of simplicity. They form part and parcel of what is here compendiously described as the last-opportunity rule.)

(2) Where the plaintiff had the last opportunity of avoiding the accident, the plaintiff fails.

These two propositions represent the residue of the stalemate rule after deducting the last-opportunity rule. The last-opportunity rule yields the third proposition.

(3) Where the defendant had the last opportunity of avoiding the accident, the plaintiff recovers the whole of his damages.

As regards the application of the present Act, it is clear that it applies to case (1), and that in this case the loss may be apportioned.

It is submitted that the Act also applies to case (2). The only doubt in the way of this conclusion is the theory that the doctrine of last opportunity is an application of the rules of causation or remoteness of damage. It is obvious that the rules of causation and remoteness continue to apply, and if

the last-opportunity rule is a part of the law of causation or remoteness, then it must continue to apply also. However, it is submitted that the last-opportunity rule is a distinct rule, and that as applied in case (2) it must now be regarded as abolished by the Act. This submission will be further argued after dealing with case (3).

The view may be taken that, although the Act applies as a matter of theory to case (2), the Court should not in case (2) award the plaintiff any part of his damage, but should in the exercise of its discretion dismiss the action. Admittedly there may be situations where this would be the just course. At the same time, it is conceived that it cannot be laid down as an invariable rule that merely because the plaintiff had or ought to have had the last opportunity of avoiding the accident, he is to be deprived of compensation in respect of any part of his damage. For instance, suppose that N1 is driving at a grossly excessive speed down a crowded street. N2, fearing that an accident may happen and in order to try to make N1 slow up, deliberately stands in his path and holds up his hand, meaning to jump out of the way if necessary at the last moment. He fails to jump in time and is injured. On such facts it may be found that N2 had the last opportunity of avoiding the accident and negligently failed to take it; yet a Judge may well regard the case as one requiring an apportionment of N2's damage.

Turning to case (3), it is submitted that the Act also applies here; and consequently that the plaintiff no longer has a right to the whole of his damages, as he had at common law, but is subject to have them abated at the discretion of the Court. This time there are two difficulties in the way of the submission.

The first difficulty results from the same view as that just considered. If it is true that the last-opportunity rule is a branch of the law of causation or remoteness, it follows that where the last opportunity is with the defendant, any contributory negligence on the part of the plaintiff is in law too remote a causal factor of the damage. Hence the situation is not one where, in the words of the sub-section, a 'person suffers damage as the result partly of his own fault'. Although the plaintiff may have been at fault, his fault has to be ignored because it is too remote.

As before, it is submitted that this view is incorrect, and that the fact that the defendant had or ought to have the

last opportunity does not in itself make the plaintiff's fault too remote a causal factor.

The second difficulty arises from the wording of the sub-section itself. The sub-section enacts that a claim 'shall not be defeated by reason of the fault of the person suffering the damage . . .'. These particular words fail to provide for the case under consideration, and are applicable only to cases of types (1) and (2). In case (3) the situation at common law was not that the claim of the plaintiff was defeated but that he recovered in full. Hence, had the sub-section stopped with the above words, it could not have been contended that it covered cases of type (3).

However, we have to see whether the case is comprised in the concluding words. The concluding words are: 'but the damages recoverable in respect thereof shall be reduced to such extent as the Court thinks just and equitable having regard to the claimant's share in the responsibility for the damage.' Now it must be admitted that some sort of case can be made out for saying that even these words do not help the defendant. The words follow on those previously quoted, and may possibly be regarded as applying only to the case where at common law the plaintiff would have failed—*i.e.*, only to cases (1) and (2). However, such an interpretation would be unfortunate, because the resulting rule would be quite irrational. The rule as to last opportunity in case (3) was developed in order to mitigate the injustice that would otherwise have resulted from an application of the rule that in cases of contributory negligence the loss lies where it falls. Now that the latter rule has been modified by the new statutory provision, there is every reason for applying the new statutory provision to case (3) and no reason for continuing to throw the whole loss on the defendant.

The lopsided result that would follow from applying the Act to case (2) and not to case (3) may be illustrated by an example. N1, driving a taxicab, negligently collides with N2, driving a lorry. N2 has the last opportunity of avoiding the accident, and each party suffers damage. In an action by N1 for damages, N2 counterclaims for damage to the lorry. On N2's counterclaim it is found that N1 was one-fifth responsible and N2 four-fifths; thus N2 recovers from N1 one-fifth of his damages. If on N1's claim it is held that the apportionment rule of the Act does not apply, it follows that N2 cannot claim an abatement of one-fifth but must pay N1 the whole of N1's damages. It is submitted that there would be no

reason for such a distinction between the parties. If such a distinction were admitted it would mean that, notwithstanding the Court's assessment of the degrees of responsibility, the losses ultimately borne by the parties would depend to some extent on the way in which they happened to fall. The object of the Act would thus be defeated.

The desirable view can be obtained from the wording of the sub-section by regarding the concluding words as an independent enactment and not as merely consequential on the words 'a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage'. In other words, the section should be interpreted, for the purpose of case (3), as though the words just quoted were omitted, and as though it provided simply that, in all cases where damage is caused by the fault of both plaintiff and defendant, 'the damages recoverable in respect thereof shall be reduced to such extent as the Court thinks just and equitable having regard to the claimant's share in the responsibility for the damage'.

In an earlier part of this discussion it was indicated that we should have to deal in more detail with the contention that the last-opportunity rule is an application of the law of causation or remoteness. It is now proposed to illustrate by examples what is or should be meant by causation, remoteness and last opportunity, in order to show the distinctions between them.

(1) *Causation.* The meaning of the word 'cause' in the following discussion may be defined as follows. If a fact E would not have occurred but for the occurrence of an antecedent fact C, then C is said to be a cause of E, and E is said to be the effect of C.[10] Every event has a number of causes, and each of these causes in turn has a number of causes, so that, as already said, every event is the result of a cone of causation stretching back in time.

In determining whether damage has been caused by the negligence of the defendant it is necessary to determine whether it has been caused by that feature of the defendant's conduct which is held to be negligent. For instance: D is driving a vehicle without keeping a proper look-out. P,

[10] It may happen that either of two causes, C_1 or C_2, could produce an effect E. Strictly speaking the above definition should be modified to provide for this type of case. It should run: 'If a fact E would not have occurred but for occurrence of an antecedent fact C_1, or would have occurred without the antecedent occurrence of C_1, only if C_1 had been replaced by another fact C_2, then C_1 is said to be a cause of E.'

driving negligently, collides with him. The facts are such that even if D had been keeping a proper look-out he could not have avoided P, and the accident would have happened just the same. Here D's driving the vehicle is a cause of the accident, for had he not been at that spot at that time the accident would not have happened. But D's negligent failure to keep a proper look-out is not a cause of the accident. Therefore there is no negligence on the part of D causing the accident and an action by P against D must fail.

As we have already seen, there is a persistent confusion in the cases between causation on the one hand and remoteness or contributory negligence on the other, but it is submitted that the questions ought to be kept separate.

(2) *Remoteness of damage.* The mere fact that D's negligence caused the accident does not make D liable, for the negligence may in law be too remote a cause, or, to use an alternative expression, may be not sufficiently proximate. The best example of this is the 'exhaustion of danger' principle. D negligently collides with P and P is injured. When being taken to hospital, P is again injured by the negligence of another driver, X, the second accident having nothing to do with the first accident except in the sense that but for the first accident P would not have been at the particular spot at the particular time and so would not have been involved in the second accident. Here D's initial negligence is a cause of P's second injury, for but for that negligence the second injury would not have been sustained. But it is too remote a cause to be considered by the law, and thus D is not liable for the second injury.

It is obvious that this conclusion as to remoteness is independent of any question of contributory negligence between the parties. It may have been that P was guilty of contributory negligence at the time of the original accident. But irrespective of the question of contributory negligence, D escapes liability on the ground of remoteness of damage.

In the above illustration the application of the law of remoteness gives a fair result; but it is submitted that remoteness is usually out of place in collision cases (which are the usual cases of contributory negligence), where both parties are at fault. Where A and B collide through the negligence of both, it will very rarely happen that the negligence of either A or B will be too remote a cause of the damage. Whether A or B has the last opportunity of avoiding the accident for the purpose of the common law of

contributory negligence is an altogether different question, as we shall now see.

(3) *Last opportunity.* Notwithstanding all that Judges have said as to the last-opportunity doctrine being a branch of the doctrines of causation or remoteness, the overwhelming weight of argument is that this is not so. The distinction between last opportunity and remoteness is best shown by taking a case involving three actors.

Consider the following hypothetical case. N1, who is subject to epileptic fits, illegally and negligently undertakes to drive a lorry. He is seized with a fit when driving and collides with N2, driving a taxi, who has the last opportunity of avoiding the accident and negligently fails to take it. P, a pedestrian, happens to be at the point of impact of the two vehicles and is injured. It is submitted that P is entitled to recover not only from N2 but from N1. N1 was guilty of gross negligence in driving a lorry when he suffered from epileptic fits, and the (perhaps slight) negligence of N2 in failing to use due care to avoid the accident when the accident was imminent, though a last opportunity as between N1 and N2 for the purpose of the common law of contributory negligence, is not a sufficient *novus actus interveniens* to make N1's negligence too remote a cause of the damage. If this is so it is evident that the law of last opportunity is not the same as the law of remoteness of damage. In the case put, N1 had not the last opportunity of avoiding the accident, yet his negligence is not too remote a cause of the accident. For the purpose of the law of remoteness his negligence is a 'proximate' cause; for the purpose of the law of contributory negligence it is not. 'Proximate cause' is therefore an ambiguous phrase, bearing one meaning in the law of remoteness and another in the law of contributory negligence. The fact that the same phrase can be used in the two branches of the law gives them the appearance of being the same, but the case just put shows that they are not.

There seems to be no English case unequivocally supporting the conclusion drawn from the hypothetical problem put above. The cases rejecting the doctrine of identification—cases like *The Bernina* [11]; *Oliver* v. *Birmingham Omnibus Co.*,[12] and the Irish case of *Wellwood* v. *King* [13]—are very

[11] (1888), 13 App.Cas. 1.
[12] [1933] 1 K.B. 35.
[13] [1921] 2 Ir.R. 274. See as to these cases MacIntyre, 'The Rationale of Imputed Negligence' (1944), 5 U. of Toronto L.J. 368.

nearly in point, for they all allow a plaintiff to recover notwithstanding any question of contributory negligence between the defendant and a third party. However, it is not clear that in any of these cases the third party had the last opportunity of avoiding the accident. The best support that can be derived from these cases for the argument here advanced is this, that the cases do not regard the question of last opportunity between the two tortfeasors as material to the issue. Had it been regarded as material it would have been discussed.

Two Canadian cases are more specific. In *Canadian Pacific Ry.* v. *Smith* (1921)[14] a train belonging to the appellant railway company (N1) was approaching a crossing without giving the statutory warning. The respondents were father (N2) and daughter (X), and N2 was driving X in his car towards the crossing. N2 negligently crossed the track without looking for the approaching train, and there was a collision. It was held by the Supreme Court of Canada, first, that N2 could not recover from N1, because he was guilty of contributory negligence. It seems clear that N2 had the last opportunity of avoiding the accident[15] (though as between N1 and N2 this was immaterial, because mere contributory negligence on the part of N2 sufficed under the stalemate rule to exclude his recovery[16]). Notwithstanding this, it was held that X, who was not identified with her father, could recover against N1.

The second case is *Topping* v. *Oshawa Street Ry.* (1931).[17] The driver of a motor-truck (N1) through negligent driving stalled his truck on the rails of an oncoming street-car. The driver of the street-car (N2) negligently failed to apply his brakes soon enough, and an impact took place in which X, a passenger in the street-car, was injured. It was held by the Appellate Division that X was entitled to succeed against N1, as well as against N2. Riddell J.A. pointed out that X must in such a case show that N1's negligence caused the accident (which is obvious), and also that N1's negligence

[14] 62 Can.S.C.R. 134.

[15] Mignault J. said: 'It is true that . . . the engine did not whistle. . . . But notwithstanding this negligence of the company, had the plaintiff been reasonably careful he would have seen the train in time, and the fact that the statutory warnings were not given cannot . . . excuse him in rushing with his eyes open to his own destruction' (at p. 151).

[16] The case arose before the passing of the Canadian Contributory Negligence Acts.

[17] 66 Ont.L.Rev. 618. Both this and the last case are cited by MacIntyre in (1940), 53 H.L.R. at 1235, reprinted in (1940), 18 Can.B.Rev. at 674.

was a *causa causans*, not a *causa sine qua non* (which is debatable). Probably what the learned Judge meant was that the negligence must not be too remote a cause. He proceeded to hold that it was an effective cause, but unfortunately cited *Loach's Case* [18] as an authority for this proposition. *Loach's Case* turned on contributory negligence, not on remoteness, so that to cite it on a question of remoteness is apt to cause misunderstanding. However, the decision reached is satisfactory.

In cases like these the Tortfeasors Act [19] clearly allows contribution or indemnity between N1 and N2, as regards the damages that either of them has to pay X. Suppose that N1 is made liable for X's damages in the first instance, and that as between themselves N1 and N2 are found equally responsible. Then, under the Tortfeasors Act, N1 recovers from N2 half the damages that he has had to pay X. This being so, it would be anomalous in the extreme to refuse to apply the Contributory Negligence Act in respect of loss suffered by N1 and N2 personally. Suppose that N2 has suffered by far the greater personal loss: would it not be most unfair to operate the Tortfeasors Act against him, thus compelling him to contribute a half of the damages paid by N1, while refusing to operate the Contributory Negligence Act in his favour, thus leaving him to bear alone the whole of his personal loss?

The greatest impediment to a correct appreciation of the difference between last opportunity and remoteness lies in that branch of the law of remoteness referred to as *novus actus interveniens*. The impression is easily created that where one party has the last opportunity of avoiding the accident, his negligent failure to take it is necessarily a *novus actus* which makes the first party's negligence too remote a cause. It is submitted that a study of the cases on *novus actus interveniens* shows that this is not so. The conclusion reached in Salmond's *Torts*, where the cases are carefully considered, is that a *novus actus* does not make the damage too remote where it was foreseeable.[20] Now in the ordinary collision case, where N1 is guilty of the first act of negligence, it is usually true to say that when N1 created the dangerous situation he ought to have foreseen that the situation might be aggravated by the mistakes of other persons, even by

[18] [1916] 1 A.C. 719.
[19] A more convenient name for this purpose than that by which it was christened —the Law Reform (Married Women and Tortfeasors) Act, 1935.
[20] 10th ed. (ed. Stallybrass) 137 ff., particularly at 144.

their negligent mistakes. Therefore the negligent mistake of another does not make the damage too remote. This is precisely the conclusion in *The Eurymedon*,[21] though there it is presented in terms of contributory negligence, instead of, as it is submitted it should be, in terms of remoteness of damage. Similar reasoning applies to the statutory duty to fence dangerous places and machinery. The main reason for this statutory duty is that if the place or machinery is not fenced, people who use it may make a negligent mistake and incur serious injury. There would be little need to fence dangerous places and machinery if everyone going near them were perfectly careful. It follows that in an action for statutory negligence in failing to fence, it cannot be regarded as making the plaintiff's damage too remote that his conduct at the time of the accident was careless. The duty is imposed for the very purpose of guarding people against the consequences of their own carelessness, and to regard the plaintiff's carelessness as making the damage too remote would tend to nullify the object of the statutory provisions. It is true that the Courts did tend to nullify the object of the statutory provisions by holding contributory negligence to be a defence in actions for breach of a statutory duty to fence, but it is submitted that with the passing of the Contributory Negligence Act these decisions ought to be regarded as superseded by the statutory scheme of apportionment.

It is further submitted that with the passing of the Tortfeasors Act and the Contributory Negligence Act the Courts ought to be more reluctant than they were formerly to declare that negligent conduct is too remote a cause of damage. The facility with which Judges have sometimes applied the law of remoteness in the past has perhaps been due in some measure to the absence of a rule allowing contribution and indemnity between joint tortfeasors. Where N1 was guilty of the first act of negligence, and N2 of a later act of negligence, and the two negligences combined caused damage to X, the Court was sometimes reluctant to make N1 liable to X, and the reason may have been that if they did so N1 would have no right of contribution against N2, although as between N1 and N2 the latter's share of the responsibility might seem to be greater. Thus it may have been the absence from the legal system of the present Tortfeasors Act that was partially responsible for some decisions on *novus actus interveniens*, just as it was the absence from

[21] [1938] P. 41.

the law of the present Contributory Negligence Act that brought about the rule of last opportunity. Now that apportionment is possible in cases of contributory negligence it is necessary to drop the rule of last opportunity, and now that contribution and indemnity are possible between joint tortfeasors it is necessary to modify the rules as to *novus actus interveniens*. Otherwise the scope of both Acts will be unduly diminished. With the passing of these Acts there is no occasion to distinguish between remoteness caused by a *novus actus interveniens* and remoteness brought about in other ways, and the law ought to be in all cases that damage is not too remote if foreseeable in kind. The adoption of this rule and the suppression of the real or supposed peculiarities of *novus actus interveniens* would effect a great simplification in the law of remoteness of damage.

Two other differences between contributory negligence and remoteness of damage may now be mentioned, by way of further support for the view that they are not applications of the same doctrine. These two differences are, however, merely of technical interest, and too much emphasis should not be placed on them.

(1) It seems that in modern law contributory negligence must be specially pleaded, whereas remoteness of damage can be argued under the general issue. This rule was assumed by Scrutton L.J. in *Bottomley* v. *Bannister* (1932).[22] But as to the first half of the rule, under the old system of pleading even contributory negligence could be raised under the general issue.[23]

(2) The question of remoteness of damage is entirely one of law for the Judge, so that if he thinks that on balance the damage was too remote, he must give judgment for the defendant.[24] But the issue of contributory negligence is primarily one for the jury, though if the undisputed evidence shows that the only rational inference is that there was contributory negligence, the Judge must direct the jury to find for the defendant.[25]

The passing of the Contributory Negligence Act makes it very important that the distinction between last opportunity and remoteness of damage should be recognised. The last-

[22] [1932] 1 K.B. 458 at 482–3. Cp. as to the first half of the rule *per* Lord FitzGerald in *Wakelin* v. *L. & S. W. Ry.* (1886), 12 App.Cas. 41 at 51–2; *Owners of S.S. Pleiades* v. *Page*, [1891] A.C. 259; R. S. C. Ord. 19, r. 15.

[23] *Per* Lord Fitzgerald in *Wakelin's Case* (last note).

[24] So Winfield, *Textbook of the Law of Tort*, 3rd ed., § 21.

[25] *Sharpe* v. *Southern Ry.*, [1925] 2 K.B. 311.

opportunity rule was a modification of the stalemate rule, and was brought into being in consequence of the failure of the common law to apply an equitable rule of apportionment. Would it not be unfortunate if we were compelled to continue the rule of last opportunity when we now have a statutory power of apportionment? Again, the statute was passed partly in order to simplify the law of contributory negligence. If the last-opportunity rule survives there will be no simplification but only further complexity.

Notwithstanding these arguments there is grave danger of the Courts whittling down the Contributory Negligence Act by refusing to apply it to cases of last opportunity. The danger comes not merely from the *obiter dicta* already considered but also from four other sources: the views expressed by text-writers, the analogy of Admiralty cases, the authority of Privy Council and Canadian cases, and the views of the Law Revision Committee.

(1) *The views of text-writers.* The theory that contributory negligence is a branch of the law of causation is adopted by Dr. Stallybrass in his edition of Salmond on *Torts*.[26] In consequence he takes the view that the last-opportunity rule is not abrogated by the Act, though he thinks that the power to apportion damages will probably tempt the Courts to ignore it in practice.[27] So also Professor Winfield considers that the causation theory is on the whole the most satisfactory, but he doubts whether it is a complete explanation.[28] The submission here made, on the other hand, is that the last-opportunity rule is simply a very imperfect attempt to give legal effect to what is usually the greater negligence of the party with the last opportunity; it is an attempt to do rough justice, and need not be stated as a branch of any other department of legal doctrine. Bohlen came more or less to this conclusion in the year 1908,[29] and it has been reinforced by a valuable article by Mr. MacIntyre in 1940.[30]

(2) *The analogy of Admiralty cases.* The original rule in Admiralty cases was that where a collision occurred through the negligence of both parties, the loss was divided equally.

[26] 10th ed. 451.
[27] *Ibid.* viii—xi, 457.
[28] *Textbook of the Law of Tort*, 3rd ed. 405.
[29] 'Contributory Negligence' (1908), 21 H.L.R. 233; reprinted in Bohlen, *Studies in the Law of Torts*, 500.
[30] 'The Rationale of Last Clear Chance' (1940), 53 H.L.R. 1225, reprinted in (1940), 18 Can.B.Rev. 665.

This rule was sufficiently fair in its working to render unnecessary any doctrine of last opportunity. However, the doctrine of last opportunity worked its way into Admiralty cases. It was first applied by the common-law Courts in cases involving collisions between ships in territorial waters. After the Judicature Act, under which appeals could be taken from the Admiralty Division of the High Court to the Court of Appeal and House of Lords, manned by common-law lawyers, it came to be applied to Admiralty cases proper.[31] As Mr. MacIntyre puts it, 'it was but natural that these appellate Courts, bewitched by the unanalysed multiguity of the word "cause", should apply those common-law doctrines with which they, and the lawyers practising before them, were most familiar. What they failed to realise was that last clear chance was fashioned to alleviate the harshness of another common-law rule unknown to Admiralty'.[32]

A further qualification upon the original Admiralty rule was introduced by the Maritime Conventions Act, 1911, which enabled the Court of Admiralty to apportion damages according to degrees of fault. The Act applied to the cases 'where, by the fault of two or more vessels, damage or loss is *caused* to one or more of those vessels', etc.; and accordingly the House of Lords held in 1924 that the last-opportunity rule survived under the Act, as part and parcel of the legal concept of causation.[33] All that can be said about this regrettable decision is that it is perhaps not absolutely conclusive,[34] and that the House of Lords may, if it so wishes, succeed in evading it by the same subtle blend of distinguishing and ignoring as was used in the *Fibrosa Case*[35] for evading the *French Marine Case*.[36] But what is needed, it is submitted, is that the House should have the authority to overrule a decision so clearly erroneous. Alternatively the matter could be set right by legislation. A

[31] *Spaight* v. *Tedcastle* (1881), 6 App.Cas. 217, *per* Lord Selborne L.C. at 219; *Cayzer, Irvine & Co.* v. *Carron Co.* (1884), 9 App.Cas. 873.

[32] 'The Rationale of Last Clear Chance' (1940), 53 H.L.R. at 1239, reprinted in (1940), 18 Can.B.Rev. at 678.

[33] *Anglo-Newfoundland Development Co.* v. *Pacific S. N. Co.*, [1924] A.C. 406.

[34] In the speeches of Lords Dunedin, Shaw and Blanesburgh it appears only as a second ground of decision, the first being that the defendant was not negligent. Lord Phillimore took the first ground, and possibly the second also by concurrence. Only Lord Atkinson based his judgment primarily upon the last-opportunity rule. It may thus conceivably be argued that the pronouncements upon the last-opportunity rule by the majority were *obiter*, or at any rate lacking in absolutely binding authority.

[35] [1943] A.C. 32.

[36] [1921] 2 A.C. 494. See *ante*, Vol. VI, pp. 47–8.

possible formula would be to enact that in applying the Maritime Conventions Act and in determining questions of causation as between two negligent parties the fact that the one had a later opportunity of avoiding the accident shall not destroy the conduct of the other as a legal and direct cause of the accident, unless such opportunity would be regarded as destroying such conduct as a legal and direct cause in civil proceedings between a third party and the person guilty of such conduct. In other words, in determining questions of remoteness as between N1 and N2, one has to picture a slight change of fact under which damage is caused not to N2 but to a third party, X. If on such changed facts N1's negligence would be regarded as too remote a cause of the damage, then it is equally too remote a cause of N2's damage. Otherwise it is in law a contributory factor and the Court has the power to apportion the damages. It is greatly to be regretted that either this formula or some other to the same effect was not introduced into the Contributory Negligence Act.

(3) *The authority of Privy Council and Canadian cases.* The Judges of Quebec, with their civil-law affiliations, were able to develop an apportionment rule in contributory negligence cases without the aid of statute. Although the doctrine met with opposition from appellate Courts, which were more familiar with common-law than with French authorities, it eventually won the day and practically excluded the doctrine of last opportunity. However, in 1915 a fresh champion of last opportunity arose in the person of the Privy Council. In *Canadian Pacific Ry.* v. *Fréchette*[37] an appeal was taken from the Quebec Courts to the Privy Council, and this body attempted to reintroduce the last-opportunity doctrine into Quebec law, holding in effect that apportionment was possible only in a case where neither plaintiff nor defendant had the last opportunity of avoiding the accident. In order to reach this conclusion it had to overrule all the Courts below. This ill-advised attempt to rivet the primitive rules of the common law upon the relatively more advanced civil-law system is said to have had little influence upon the practice of the Quebec Courts.[38] But there is little doubt that the decision

[37] [1915] A.C. 871.

[38] See MacIntyre in (1940), 53 H.L.R. at 1236–8, reprinted in (1940), 18 Can.B.Rev. at 675–7. *Contra*, MacDonald in (1935), 13 Can.B.Rev. 560, quoting Goldenberg, *The Law of Delicts under the Civil Code of Quebec* (1935).

will now be produced in English Courts as an authority upon the construction of the English Act.

The common-law Provinces of Canada started with the English rules of contributory negligence. Apportionment was first introduced by statute into the Province of Ontario [39] (significantly, the neighbour of Quebec), but from the start the Ontario Courts held that it applied only to cases of concurring negligence and not to cases where one party had the last opportunity.[40] Later, as a result of Conferences of the Commissioners on Uniformity of Legislation in Canada, a uniform law was drafted which was adopted, with some variations, in the Provinces of British Columbia,[41] Nova Scotia,[42] Brunswick,[43] Alberta,[44] and Prince Edward Island.[45] Again the Courts took the view that the doctrine of last opportunity was not excluded. The best-known case is *McLaughlin* v. *Long* (1927),[46] a decision of the Supreme Court of Canada under the New Brunswick Act. The facts were that the defendants' servant was in charge of and driving a motor truck from which he was delivering goods to customers. He allowed some boys to ride with him, and the plaintiff, a boy of ten, was standing on the running-board. The driver asked him to get off. The boy ignored this request, and the driver took no further steps to enforce it, but drove off while the boy was still on the running-board. Through the driver's negligent driving (which had nothing to do with the presence of the boy on the running-board) the car plunged off the road and the boy was injured. It was held that the boy was not guilty of contributory negligence and was entitled to recover in full. The Court cited two cases that have already been noticed by us: *Spaight* v. *Tedcastle* [47] (an analogous English

[39] The Contributory Negligence Act, 1924 (c. 32), substantially repeated in the Contributory Negligence Act, 1927 (c. 103); re-enacted in different form in the Negligence Act, 1930 (c. 27), amended in 1931 (c. 26) and 1935 (c. 46). The original Act was due to the initiative of Mr. M. J. Gorman K.C.: see articles by him in (1917), 37 C.L.T. 23, (1922), 42 C.L.T. 425; see also MacMurchy in (1923), 1 Can.B.Rev. 844, and note in (1924), 2 Can.B.Rev. 206.

[40] *Walker* v. *Forbes* (1925), 56 O.L.R. 532, [1925] 2 D.L.R. 725; *Mondor* v. *Luchini* (1925), 56 O.L.R. 576, [1925] 2 D.L.R. 746; *Farber* v. *Toronto Transportation Commission* (1925), 56 O.L.R. 537, [1925] 2 D.L.R. 729.

[41] Statutes, 1925, c. 8.

[42] Statutes, 1926, c. 3.

[43] R. S. N. B. (1927), c. 143. For the text of all these Acts up to 1936, see C. F. Davie, *Common Law and Statutory Amendment in Relation to Contributory Negligence in Canada* (Toronto, 1936) 279 ff.

[44] Statutes, 1937, c. 18.

[45] Statutes, 1938, c. 8.

[46] [1927] S.C.R. 303, [1927] 2 D.L.R. 186.

[47] Above n. 31.

case on the Admiralty rule) and *C. P. Ry.* v. *Fréchette* [48] (the Privy Council case on the Quebec law of *faute commune*).

The decision at first sight appears reasonable, because the negligent driving had nothing to do with the presence of the boy on the running-board. The fact that the car plunged off the road was undoubtedly due simply and solely to the negligence of the defendants' driver. However, the plunging of the car off the road was not in itself a tort to the boy. The action of negligence presupposes damage, and in order to decide the case one has to ask oneself whether the boy's act of standing on the running-board contributed to his own damage. This depends on the question whether he would have been injured had he been inside the car. If the driver had taken the car over a cliff, the negligence of the passenger in standing on the running-board would clearly not have been a factor contributing to his injury. On the facts as they occurred, however, it seems that the boy would have been safe had he been inside, and thus his negligence was a factor contributing to his injury. The question that then arises is whether the negligent driving on the part of the driver was a sufficient *novus actus interveniens* to make the boy's act of standing on the running-board too remote a cause of the damage. In order to answer this question correctly it is best to imagine that the action had been brought not by the boy himself but by a third party, thus getting rid of the element of contributory negligence and reducing the case purely to one of remoteness of damage. The requisite change can be made by imagining that the boy was wearing clothes belonging to a third party, that these clothes were damaged, and that the third party sued the boy for negligence. If on such facts the third party would fail, then the decision in *McLaughlin* v. *Long* is right, for then the boy's negligence would indeed be too remote a cause of his own injury. But if the third party would on such changed facts succeed in his action, the decision on the actual facts must be wrong. The way in which the particular question is answered is of no importance for the main theme of this paper, though it is submitted that on such altered facts the third party would succeed against the boy,[49] who would be regarded as a joint tortfeasor with the driver, and therefore that on its actual facts *McLaughlin* v. *Long* is wrong. Of course, to say that

[48] Above n. 37.
[49] Cp. *Burrows* v. *March Gas Co.* (1872), L.R. 7 Ex. 96.

it is wrongly decided as regards the principle at issue is not to say that the net result is wrong, for where the plaintiff's share in the accident is regarded as venial and the defendant's negligence is gross it should always be open to the Court in the exercise of its discretion to refrain from deducting any portion of the plaintiff's damages.

The perpetuation of the last-opportunity rule under the Canadian negligence statutes has been the subject of an ever-growing volume of criticism. Legislative amendment was advocated by Dean Falconbridge in 1927, for otherwise, he said, 'we do not seem to be much better off than before—we must first apply the old law, and compel the jurors to answer the old series of questions, which they probably do not understand, before we can decide whether the present statute applies at all, and then put another question to the jury in the event of the statute applying'.[50] This change of feeling may be reflected in certain decisions of the Canadian Courts, which, while not perhaps expressly disavowing the rule in *McLaughlin* v. *Long*, depart from the strictness of the common law as to last opportunity. In *Morgan* v. *British Columbia Electric Ry.* (1930)[51] the plaintiff parked his motor truck on a dark and rainy night in such a position that it was foul of the track of a street railway (*i.e.*, tramway). The defendant's motorman, driving a tramcar without keeping a proper look-out, collided with the truck. It was found as a fact that he would have seen the truck in time to stop his car if he had been keeping a proper look-out; yet notwithstanding this finding damages were apportioned by the British Columbia Court of Appeal. The striking thing is that Martin J.A. expressly held that the case was on all fours with *Davies* v. *Mann*; yet he concurred in the apportionment. Again, in *Irvine* v. *Metropolitan Transport Co.* (1933)[52] a situation occurred closely resembling that in *Tart* v. *Chitty*[53] and *Baker* v. *Longhurst.*[54] One dark and snowy night N1 left a motor truck standing on the highway, it being found as a fact that in the circumstances this was negligent. N2, driving too fast, collided with the truck. It was held that N2 was entitled to recover 25 per cent. of his damages from N1. On the face of it the case might seem to

[50] (1927), 5 Can.B.Rev. at 583–4.
[51] [1930] 4 D.L.R. 30, [1930] 2 W.W.R. 776, 42 B.C.R. 382.
[52] [1933] O.R. 823, [1933] 4 D.L.R. 682.
[53] [1933] 2 K.B. 453.
[54] [1933] 2 K.B. 461.

have been the same as *Butterfield* v. *Forrester* and *Davies* v. *Mann*; but it was held that the negligence of both parties continued up to the moment of the accident and that the plaintiff could accordingly recover under the Contributory Negligence Act. As in *The Eurymedon*,[55] the Court, knowing that if it fails to find a last opportunity it will be able to use the statutory power to apportion, is no longer so anxious to find a last opportunity as it was at common law. Indeed, Masten J.A. admitted this when he said that 'the Contributory Negligence Act has not abolished the doctrine of ultimate negligence but, in determining whether the plaintiff's negligence was contributory or ultimate, I think we are to be guided by the doctrines which the Maritime Courts have established respecting collisions of ships rather than by the doctrine of the common law'.

The former decision, namely that in *Morgan* v. *British Columbia Electric Ry.*, was criticised by two writers as an expression of the existing law,[56] though the first of these writers suggested legislative change on the ground that the instant decision approximated very closely to abstract justice and that the rule usually adopted 'works in many, if not in the majority of cases, a real injustice'. Of three more recent articles on the subject in the Canadian Bar Review, two attack the rule of last opportunity while only one suggests that it may be retained subject to modifications.[57] The matter has also been under consideration by the Conference of Commissioners on Uniformity of Legislation since 1928. At first, in 1928, the Commissioners decided that it was impossible to draft a measure to avoid an inquiry into last

[55] [1938] P. 1.

[56] I. S. Fairty in (1931), 9 Can.B.Rev. 52; J. A. Weir in *ibid.* 470.

[57] The two articles first referred to above are Robinette in (1933), 11 Can.B.Rev. at 90–1 and MacIntyre in (1940), 53 H.L.R. 1225, reprinted in (1940), 18 Can.B.Rev. 665. The third is Vincent C. MacDonald in (1935), 13 Can.B.Rev. at 555–63. At p. 555 Mr. MacDonald admits that there is 'general dissatisfaction with the restricted scope of the Acts'.

A curious work on the Canadian legislation is C. F. Davie's *Common Law and Statutory Amendment in Relation to Contributory Negligence in Canada* (Toronto, 1936). This writer strongly supports the last-opportunity rule, believing it to be part of the legal concept of causation (he does not discuss the difficulty in the way of his view where an innocent plaintiff is suing one of two negligent tortfeasors). In consequence he believes that many cases in which the Canadian Courts have applied the apportionment legislation are wrongly decided. His discussion of the cases in which, as he thinks, the statutes were wrongly applied takes seventy-three pages, while the cases in which he thinks the statutes rightly applied are so few that they can be dismissed in eleven pages. It is clear that Mr. Davie's view would deprive the statutes of most of their remedial effect. For a critical review of the book (not, however, in respect of the last-opportunity rule), see (1936), 14 Can.B. Rev. 368; reply, *ibid.* 563.

opportunity, but in 1934 they adopted a compromise suggestion under which the Judge was to be directed by statute not to submit to the jury any question of last opportunity unless in his opinion there was evidence upon which the jury could reasonably find that the act of one party was clearly subsequent to and severable from the act of the other.[58] Such a legislative direction would, in England at any rate, have little positive effect, for it seems merely to state the law as laid down in *The Volute*[59] and *Swadling* v. *Cooper*.[60] Also, as an amelioration of the last-opportunity doctrine it is mainly confined to collision cases: it would have little application to contributory negligence in cases of breach of duty to fence dangerous places or machinery, for here the last opportunity of the employee is clear. The Commissioners' suggestion has, however, been adopted in the Contributory Negligence Acts of Alberta[61] and Prince Edward Island.[62]

(4) *The views of the Law Revision Committee.* The Law Revision Committee, in proposing the apportionment rule which has now been adopted by Parliament, did not overlook the relation of the new statutory scheme to the last-opportunity rule; they expressly considered it.[63] And the conclusion to which they came was that the last-opportunity rule should stand. The reasons for this important decision are given as follows.

(i) The last-opportunity rule is merely a rule of causation. It has already been submitted that this is a confusion of two separate principles of law.

(ii) Owing to their ability to apportion the blame the Judges of the Admiralty Court have not made the same 'meticulous analysis' of causes as the common-law Judges. The conclusion from this appears to be, though it is not expressly stated, that under the Contributory Negligence Act there will be a relaxation of previous common-law principles, even though they are not expressly abandoned. Just as, before the Act, Judges tried to say that the defendant had or should have had the last opportunity, if that conclusion achieved rough justice in the particular case, so, under the Act, Judges will try to deny that either party had or ought

[58] See (1935), 13 Can.B.Rev. 562.
[59] [1922] 1 A.C. 129.
[60] [1931] A.C. 1.
[61] Statutes, 1937, c. 18, ss. 5, 6.
[62] Statutes, 1938, c. 5, ss. 5, 6.
[63] Eighth Report (Contributory Negligence), Cmd. 6032 of 1939, pp. 16—17.

to have had the last opportunity, thus bringing the case within the common-law stalemate rule and so within the ambit of the Act. We have already seen that this has been the tendency in Canada. In so far as the Judges succeed in doing this the fact that the Act may not theoretically abolish the last-opportunity rule is of no practical effect.

Nevertheless it is submitted, with respect, that this is not a satisfactory way of leaving the matter. In the first place it leaves the new principles to be worked out at the cost of the parties in expensive litigation, instead of providing for them in the reformatory Act itself. The experience in Canada is enough to warn us of the volume of litigation that is likely to follow from this course. In the second place, with the doctrine of precedent, it leaves open the possibility that some cases on all fours with decided cases will be held to be governed by them.

This second difficulty arises particularly in certain types of case. Where the damage arises through a collision of two vehicles or ships the difficulty is not so acute, because it is frequently possible for the Courts in these cases to oust the last-opportunity rule by the 'separation of time, place or circumstance' rule in *The Volute*,[64] or by the 'negligent mistake' rule in *The Eurymedon*,[65] or even by an extension of the type of reasoning employed in *Loach's Case*.[66] In some other situations, however, this is quite impossible. For instance, where the collision occurs between a moving vehicle and a fixed obstruction, with negligence on both sides, it is often impossible for the Court to avoid applying the last-opportunity rule in the same way as it was applied in *Davies* v. *Mann*.[67] Take, again, cases on breach of statutory duty. The standard case is where the defendants have broken a statutory duty to fence a dangerous place or machine and the plaintiff, an employee, has been injured in consequence. In such circumstances the common-law position was as follows: (*a*) If the plaintiff was completely exonerated by the Court from the charge of negligence, as he was for example in *Caswell's Case*,[68] he recovered in full. (*b*) If the plaintiff was held to have been guilty of contributory negligence, as he was in *Dew* v. *United British Steam-*

[64] *Admiralty Comrs.* v. *S.S. Volute*, [1922] 1 A.C. 129.
[65] [1938] P. 41.
[66] *British Columbia Electric Ry.* v. *Loach*, [1916] 1 A.C. 719.
[67] (1842), 10 M. & W. 546.
[68] *Caswell* v. *Powell Duffryn Associated Collieries, Ltd.*, [1940] A.C. 152.

ship Co.[69] and *Lewis* v. *Denye*,[70] he recovered nothing. (*a*) remains the same under the Act. As to (*b*), it is clear that the plaintiff in cases of this type had the last opportunity of avoiding the accident, and therefore, if the last-opportunity rule survives the statute, the Judges are still powerless to award the plaintiff any portion of his damages even under this remedial legislation. It is no use the Law Revision Committee suggesting that the Courts will be benevolent in determining causation under the new Act; this is a case where, if the last-opportunity rule survives, the Courts can do nothing.

A survival of the last-opportunity rule in this type of case would be particularly surprising for two reasons. In the first place, the case is one in which the greater share of the blame is likely to rest with the employer, who has exposed his employees to danger by neglecting to fence. At common law the Courts could give a remedy to the employee only by declaring that the employee's conduct at the time of the accident was not negligent at all, and this declaration was usually nothing more than a form of pious perjury to give the unfortunate employee a remedy. It would be regrettable if this straining of the law has to be continued under the present Act; and, of course, cases occur (like *Lewis* v. *Denye*) where even this straining is not possible. In the second place, a denial of a remedy under the new Act in this type of case would be surprising because the Act itself seems to contemplate that a remedy is given. Section 4 of the Act defines 'fault' as used in the Act to include a breach of statutory duty. The commonest case of breach of statutory duty is the failure to fence dangerous places, and in such circumstances any contributory negligence on the part of the plaintiff will invariably amount to a failure to take the last opportunity of avoiding the accident. It is difficult to imagine that Parliament intended this type of case to be excluded from the scope of the Act.

(iii) The next contention of the Law Revision Committee is that if the necessity for causation in the legal sense is abandoned, 'it is difficult to see to what matters the causes of an accident can be limited'. The answer to this argument is twofold. (*a*) Abandonment of the last-opportunity rule would still leave us with the law of causation proper and of

[69] (1928), 139 L.T. 628.
[70] [1940] A.C. 921.

remoteness. (*b*) Under an apportionment rule questions of causation and remoteness in respect of initial liability lose most, if not all, of their importance, for the slightness of causation or the remoteness of a cause can always be registered in a refusal of the tribunal to take the cause into consideration in the apportionment of responsibility.

(iv) Last, the Committee argues that to abandon the last-opportunity rule would involve the difficulty of either (*a*) altering the Admiralty rule also and for that purpose amending an Act that has been passed to give effect to an International Convention, or (*b*) making the common law again inconsistent with the Admiralty rule. This is perhaps the weakest argument of all. As to alternative (*a*), an alteration in the present Admiralty rule would, it is true, involve an alteration in the established interpretation of the Maritime Conventions Act. But it would not involve an alteration in the Act itself, and so would not be a violation of the Convention of Brussels. The Maritime Conventions Act says nothing of last opportunity, but speaks only of causation. An Act passed to make it clear that last opportunity is not the same as causation would not be an amendment of the Maritime Conventions Act, but would merely set right the mistaken interpretation of that Act. It would bring English law into line with civil-law systems, which in applying the law of *faute commune* do not regard a last opportunity as ousting the power to apportion,[71] and it would therefore further, not defeat, the purpose of the Convention of Brussels, which was to render uniform the law of the sea.[72] As to alternative (*b*), if it is a separate argument at all it must mean no less than this, that where one branch of the law is unsatisfactory, another branch that is the subject of legislative amendment must also be made unsatisfactory in order that both may be the same. It means that if the Committee is given the choice between having one department of the law perfect and another imperfect, and having both departments imperfect, it elects to have them both imperfect. Putting the matter in human terms, it means that if the Committee

[71] See F. P. Walton's criticism of the last-opportunity rule from the civil-law standpoint in (1933) 49 L.Q.R. 82–3.

[72] The origin of the Convention is interestingly described by Louis Franck in (1926) 42 L.Q.R. 25.

It may be added, if another argument is needed, that even if it were necessary to amend the treaty rules themselves, the Contributory Negligence Act would afford a precedent for doing so. S. 1 (7) amends the treaty rules enacted in the Carriage by Air Act, 1932.

have their way an unknown number of factory hands are in the future going to lose tort compensation for injuries suffered in part through their employers' grave breach of duty, and this for no better reason than that lawyers want to keep Admiralty and common-law rules the same.

As against the supposed advantages of the last-opportunity rule the Committee hardly sees one of the objections to it. True, it is recognised that the rule is 'at times' difficult and uncertain in its working, but this difficulty is explained away by saying that it is always the result of the complicated facts and not of the law. 'The events which lead up to an accident are often complicated, and the law which cannot take account of every cause must do its best to choose that which seems most consistent with what it regards as common sense and common fairness.' Assuming that this is what the common law did (which may be somewhat doubted[73]), it was indeed a sound enough rule, *given the initial premise of the common law that the damages could not be divided.* But it ought to be recognised that the search for *the single* cause of an accident was always illusory, and that now that the Judges can apportion damages even common sense and common fairness demand that we give it up.

Although a majority of the Committee consisted of present- or one-time teachers of law, no mention is made of the burden on teacher and student involved in perpetuating the hotchpot of decisions on last opportunity. At a time when the law is expanding in every direction and the burden on teacher and student becomes ever more onerous, the law lecturer is still to go on year after year reconciling or trying to reconcile *Loach's Case* with *Butterfield* v. *Forrester* and *The Eurymedon* with *Davies* v. *Mann.* Surely, even if only in the interests of those who have to learn the law, a cardinal aim of law reform ought to be simplification wherever possible.

It may be added that the teacher's lot is not the only unhappy one, for the difficulty of instructing a law student in the subtleties of last opportunity is as nothing to the difficulty of instructing a jury. Lord Atkin said:

[73] It will be recalled that in *Loach's Case*, [1916] A.C. at 727, Lord Sumner said: 'The question is not one of desert or the lack of it, but of the cause legally responsible for the injury.' Ignoring the second part of the statement the first part had a measure of truth: no amount of bad desert on the part of the defendant availed the plaintiff unless the defendant had or should have had the last opportunity. But the last-opportunity rule is itself an attempt to give legal expression to what is thought to be the defendant's bad desert.

> Nothing is more difficult than to direct a jury with regard to contributory negligence in an ordinary running down case and to apply the doctrine of *Davies* v. *Mann*.[74]

If the rule of last opportunity survives the new Act the difficulty will be increased, for now juries will have to be instructed not only on the law of last opportunity, where relevant, but also on the apportionment rules. As usual, Canadian cases point a moral in this respect. In one Canadian case a new trial had to be ordered where the jury, thoroughly muddled, had assessed the degrees of fault and then added that *both* parties had the *last* opportunity.[75]

In view of this rather depressing aspect of the Committee's recommendations one is glad that its report is not admissible in evidence. A Judge may know about the report, but if so he is entitled to keep his knowledge to himself. The report is therefore no legal hindrance to a decision that the last-opportunity rule has been abrogated by the Act.

It may be added in conclusion that the question here discussed is left open in the only case on the Act that has been reported at the moment of writing. This is *Jay & Sons* v. *Veevers, Ltd.* (1946),[76] where Lynskey J. mentioned that neither party had a last opportunity and proceeded to apportion the damages. The fact that the learned Judge thought fit to mention the question of last opportunity is some indication that in his view it was relevant. However, the question does not appear to have been argued.

More troublesome, perhaps, is the case of *Smith* v. *Bray* (1939),[77] where Hilbery J. held, on the similar wording of the Joint Tortfeasors Act, that the apportionment is to be on the basis of causation and not on the respective degrees of negligence of the parties. It is respectfully submitted that either this is a distinction without a difference or it is incorrect. It is true that the wording of the Act affords some ground for the decision by suddenly switching from the term 'fault' to the term 'responsibility', but it is submitted that 'responsibility' here means moral responsibility and therefore means the same as 'fault' in the

[74] (1925) Journal of the Society of Public Teachers of Law 14. See also O'Connor L.J. in (1922) 38 L.Q.R. 17.
[75] *James* v. *McLennan, McFeely and Prior, Ltd.*, [1941] 1 D.L.R. 555, noted (1941), 19 Can.B.Rev. 222: and cp. *Gives* v. *C. N. Ry.*, [1941] O.W.N. 376, noted *ibid.* 754.
[76] [1946] 1 All E.R. 648.
[77] 56 T.L.R. 200.

ordinary meaning of that word (not necessarily the same as 'fault' in the special meaning given to it by section 4 of the Contributory Negligence Act). If Hilbery J.'s view be right, it would seem to mean that in cases of concurrent negligence the loss must be divided equally, however great the degree of blame on one side and however small the degree of blame on the other side. It is difficult to believe that this is the correct interpretation of the Act.

II

THE discussion of last opportunity has taken somewhat excessive space, and it is time to sketch the other provisions of the Act. The general apportionment rule in section 1 (1) is subject to a precautionary proviso which declares that it does not defeat any defence arising under a contract (*e.g.*, a contractual consent to run the risk of harm), and that the damages awarded must not exceed any maximum fixed by contract or enactment (*e.g.*, a maximum sum fixed in a workman's railway ticket, or the maximum provided in Article 22 (1) of the Convention in the Schedule to the Carriage by Air Act, 1932). Sub-sections (2) and (6) provide that the Court or jury shall determine the total damages that would have been recoverable if the claimant had not been at fault; this is to prevent the need for a new trial where the decision is varied on appeal. Another precautionary provision is sub-section (3), which makes the obvious point that if there are two or more defendants the provisions of the Tortfeasors Act shall apply between them. Sub-section (4) provides in effect that where an action is brought under the Fatal Accidents Acts the dependants are identified with the deceased for the purpose of the Contributory Negligence Act, so that the compensation they recover may be reduced under the Act. The provisions of the Act are also expressed to modify Article 21 of the Convention in the Schedule to the Carriage by Air Act, 1932.

Section 2 aroused much controversy during the passage of the Bill, and was considerably changed. It deals with the situation of a plaintiff who has the choice of bringing either a common-law claim against his employer or a claim for workmen's compensation. If he chooses to bring the common-law action, and the damages awarded to him are reduced under the Act on the ground of his contributory negligence, the result may show that it would have been

more to his advantage to claim under the Workmen's Compensation Act, where contributory negligence as such is not a defence. Accordingly section 2 of the Contributory Negligence Act provides that the plaintiff may in such a case ask the Court not to give him damages under this Act but instead to assess compensation under the Workmen's Compensation Act.

Section 3 excludes Admiralty cases from the scope of the Act, and also cases arising before the passing of the Act. Section 4 contains various definitions: in particular it defines 'damage' (in section 1 (1)) to include loss of life and personal injury, and it defines 'fault' to mean negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort or would, apart from the Act, give rise to the defence of contributory negligence. The Act, therefore, applies to claims for breaches of strict statutory duty. Sections 5 and 6 provide for the application of the Act to Scotland and (if adopted) to Northern Ireland.

Two flaws in the drafting of the Act are worth notice.

(*a*) It will be remembered that section 1 (1) provides that 'where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons', the apportionment provision shall apply. There is a somewhat remarkable omission here for the case where damage is caused in part by the negligence of the plaintiff's servant. One would have expected to find, after the words 'his own fault', the words 'or the fault of a person for whom he is vicariously responsible'. It is well settled that in the law of contributory negligence a master is identified with his servant, a partner with his co-partner, and an employer with his independent contractor, to the extent that there is vicarious liability for these persons according to the general rules of the law of tort. If, therefore, a master brings an action in respect of damage to which his servant, acting in the course of the employment, negligently contributed, the master is liable to be met by the defence of contributory negligence to the same extent as if the action were brought by the servant. It cannot be supposed that the Act was intended to be silent on this matter, and thus presumably the words 'his own fault' will be read as including by implication the fault of one for whom the master is vicariously liable.

This interpretation is assisted by the recent case of *Twine*

v. *Bean's Express, Ltd.* (1946).[78] The facts there were that the driver of a van, contrary to instructions, allowed T. to travel in the van, T. knowing that he had no right to be there. Owing to the negligent driving of the driver, T. was killed. In an action by T.'s personal representatives against the employers of the driver, Uthwatt J. (as he then was) held that the employers were not liable. The reason given was that T. was a trespasser, the employers did not know of his presence on the van, and therefore the employers owed no duty towards T. The decision is of great interest on the theoretical foundation of vicarious liability. It seems to mean that vicarious liability does *not* rest on the attribution to the master of the servant's breach of duty. Had the latter view been taken in the instant case, then, since the driver was clearly liable to the plaintiff in negligence,[79] and since his negligent driving was apparently in the course of his employment, it would apparently have followed that his actionable negligence would have been imputed to the employers. Uthwatt J. rejected this view and held that the question was not whether the servant had broken his duty to the deceased but whether the employers had broken their own duty to the deceased. Vicarious liability meant that the *acts* of the servant were imputed to the employer, not that the *duty* of the servant was imputed to the employers. To quote Uthwatt J.'s words, 'the law attributes to the employer the acts of a servant done in the course of his employment and fastens upon him responsibility for those acts. In determining the duty of the employer and the duty of the servant on any occasion, all the circumstances have to be considered. In the general run of cases, the duty of both is the same; but that is a coincidence, not a rule of law. The general question in an action against the employer, such as the present, is technically: "Did the employer in the circumstances which affected him owe a duty?"—for the law does not attribute to the employer the liability which attaches to the servant'. In the instant case, the acts of the servant did not constitute a breach of duty by the employers, because the employers themselves owed no duty to a trespasser of whose presence they were unaware. (Apparently the servant's knowledge of the trespasser's presence could not be imputed to the employers, because the servant was acting outside the

[78] [1946] 1 All E.R. 202.
[79] *Lewys* v. *Burnett*, [1945] 2 All E.R. 555.

course of his employment in respect of allowing the trespasser to be there at all.) If Uthwatt J.'s view is correct, and it is submitted that it is,[80] it enables the proper interpretation to be placed upon the present words of the Act. For, on Uthwatt J.'s view, where a servant does an act in the course of his employment, this act is, for the purpose of the law of tort, attributed to his master; and if the act falls within the statutory definition of 'fault' (*i.e.*, if it is an act that would, apart from the Act, give rise to the defence of contributory negligence), the act, being in law the master's act, is also in law the master's 'own fault' within the words of the sub-section. In any event, quite apart from technicalities, it is submitted that the Act ought to be interpreted in the light of its broad policy; and it cannot be inferred from the omission of reference to vicarious liability that the legislature intended to change the settled principle that vicarious liability, where it occurs, is treated in the same way as personal liability.

(*b*) The second hiatus in the Act occurs in section 5, the contents of which have not hitherto been given in this note. The sub-section provides as follows:

> Where, in any case to which sub-section (1) of this section applies, one of the persons at fault avoids liability to any other such person or his personal representative by pleading the Limitation Act, 1939, or any other enactment limiting the time within which proceedings may be taken, he shall not be entitled to recover any damages or contributions from that other person or representative by virtue of the said sub-section.

The sub-section is designed to avoid unfairness resulting from the lopsided working of statutes of limitation. It is, however, imperfect in not adding the words 'or his personal representative' after the words 'one of the persons at fault'. This may be seen by taking two illustrations.

[80] The view has the advantage of explaining how it is that a master may be vicariously liable in tort although the servant himself owed no duty to the plaintiff. For instance, a statute imposes upon a railway company the duty to provide gates at a level crossing. The company provides gates and a keeper, and the keeper carelessly fails to shut the gates. It seems possible that the keeper would not himself be liable to the member of the public who is injured, for the keeper possibly owes no duty to the public, but only to his employers. Thus the keeper has on this view committed no tort, and if vicarious liability means vicarious liability for the tort of the servant, the company cannot be liable. But actually it is liable (*North Eastern Ry.* v. *Wanless* (1874), L.R. 7 H.L. 12). This means that the law attends to the duty of the master, making the master liable for breach of the duty imposed on the master, and regarding the breach as occurring through the act of the servant.

(i) A, a civilian driver, collides with B, an army driver, by the fault of both. Twelve months after the accident A dies. His personal representatives bring an action against B in which B files a counterclaim, and by way of defence to A's claim pleads section 21 of the Limitation Act, 1939 (formerly the Public Authorities Protection Act, 1893). The present sub-section provides that if B succeeds in his defence under the Limitation Act, he must fail in his counterclaim under the Contributory Negligence Act. This is a fair result.

(ii) As before, save that it is B, not A, who dies. Twelve months after the accident A sues B's personal representatives, and they counterclaim and plead section 21 by way of defence. Read literally, the sub-section fails to provide for this case. It applies only where B avoids liability to A or A's representatives by the plea of the Limitation Act; it does not, on its terms, apply where B's personal representatives raise the plea. It is to be hoped that the Courts will regard B's personal representatives as sufficiently identified with him to be caught by the provision.

GLANVILLE L. WILLIAMS.

REVIVAL OF CONDONED MATRIMONIAL OFFENCES

THE question of what conduct is necessary to revive a condoned matrimonial offence which has agitated the Divorce Courts in recent years has been recently settled by the decision of the Court of Appeal in *Beard* v. *Beard*,[1] where Scott and Lawrence, L.JJ. held, Vaisey J. dissenting, that condoned adultery was revived by desertion for less than three years, even though such desertion is not a ground for independent matrimonial relief. Despite the fact that the law must now be regarded as settled by this decision, it is interesting to examine some of the deeper grounds and implications of the Court of Appeal's decision. Before making this examination it may be as well to point out that the question at issue is not the restricted one posed by a learned writer in a recent article in this journal[2] of whether a condoned matrimonial offence will be revived by desertion for less than three years, but whether it can be revived by any conduct short of a matrimonial offence for which substantive relief can be granted in the Divorce Courts. This wider question embraces other forms of matrimonial misconduct such as cruelty, indecent or irregular conduct not constituting adultery, and less serious conduct such as failure to support.[3] There seems no doubt that the decision in *Beard* v. *Beard* carries with it an affirmative answer, though with certain reservations, to this wider question.

At the outset it must be pointed out that the public interest in matters of divorce which is so often referred to and relied on[4] involves at least two countervailing social interests, namely:—

(a) the necessity for the maintenance of stable family life and marriage as an institution; and

(b) the desirability of dissolving the marriage tie in cases where it would be futile to continue it.

These countervailing interests were expressly recognised by

[1] (1945), 61 T.L.R. 555.
[2] Rupert Cross, 'The Revival of a Matrimonial Offence by Subsequent Misconduct' (1945), 8 MOD.L.REV. 149.
[3] *Moore* v. *Moore*, [1892] P. 382; *Ridgway* v. *Ridgway*, 29 W.R. 612; *Pereria* v. *Pereria*, I.L.R. 5 Mod. 118; *Halligan* v. *Halligan*, 30 N.Z.L.R. 306; *DeLuca* v. *DeLuca*, 12 S.R.(N.S.W.) 619.
[4] Cf. 8 MOD.L.REV. at 156.

Viscount Simon L.C., who said in *Blunt* v. *Blunt*[5] that a consideration of primary importance is—

> The interest of the community at large, to be judged by maintaining a true balance between respect for the binding sanctity of marriage, and the social considerations which make it contrary to public policy to insist on the maintenance of a union which has utterly broken down.

The question of condonation of matrimonial offences brings into focus a third social interest, which is equally related to the interests already mentioned: it is the desirability of promoting the reconciliation of the parties to a marriage even though there has been some breach of the matrimonial relationship sufficient to justify a dissolution of marriage. The prospect of reconciliation cannot and must not be overlooked in any state of marital estrangement, and it is therefore fundamental that the law should not so disregard the future welfare and rights of innocent spouses as to deter them from forgiving the guilty party and resuming cohabitation. This accords with the rule which originated in the Ecclesiastical Courts that condonation is conditional, and that on breach of the condition the innocent spouse is remitted to his or her former rights.[6] On the other hand, however, reconciliation could rarely be expected if the terms are so onerous to the guilty party that the merest deviation from a course of model conduct will enable the innocent arty to repudiate the reconciliation for good and all.[7]

The adjustment of these factors would be difficult enough where one could have recourse to complete statistical analyses of broken marriages, effective reconciliations and abortive attempts at reconciliation, so as to ascertain what was most socially advantageous. When this is made impossible by practical considerations and the operation of rules of evidence, so that a Court is bound to deduce a principle without such material, it may be said that it can achieve a result only by trial and error, or by reliance upon irrelevant considerations, historical analogies and other devices of competing or meaningless reference. It may be asserted with some force that this is

[5] [1943] A.C. 517 at 525.
[6] *Cramp* v. *Cramp*, [1920] P. 158; *Henderson* v. *Henderson*, [1944] A.C. 49.
[7] Cf. *Collins* v. *Collins* (1884), 9 App.Cas. 205, where Lord Blackburn, in commenting on *dicta* of Sir John Nicholl in *Durante* v. *Durante*, 1 Hagg.Ecc. 733, said: 'If this language is to be taken without qualification, and followed to its logical result, it would follow that, however long a spouse had, after condoned adultery, lived chastely and in full performance of all that a spouse should do, any lapse, however slight and venial in itself from duty, revived the old adultery, and obliged, or at least enabled, the Court to decree a separation.'

what has happened and that the diverse decisions on condonation, both in England and Australia, represent attempts to find a principle of real social utility by experimental groping in the dark. In form, all the decisions on this subject are rested on the same premises, the same authorities are cited and analysed, and the principles and practice of the Ecclesiastical Courts are called in aid. A review of the decisions on this subject in recent years serves to show that authority alone has been a poor guide to the Courts in arriving at the conclusion now established by *Beard* v. *Beard*.[8] The variations in the judgments of first instance, particularly the recent ones,[9] have not been due to a failure to understand the *ratio decidendi* of earlier cases nor to any difficulty in applying those cases; nor has the passage of the Matrimonial Causes Act, 1937, had such an influence as to give rise to these decisions because, although it has liberalised the divorce law and assimilated divorce and judicial separation, the confusion in the decisions is equally manifested in England both before and after its passage.

The judgment of Scott L.J. in *Beard* v. *Beard* contains a guarded but implicit recognition of the process I have mentioned. His Lordship said:—

> Where the post-condonation offence is desertion, the adoption of Mr. Justice Hodson's principle would have the effect of depriving the revival rule of any practical value; for it would not operate till the desertion had lasted long enough to make it superfluous. But, in truth, comparison on grounds of public policy is for Parliament, which can legislate, rather than for the Courts. The trend of judicial decision from 1780 onwards till the present year has been to uphold the rule that the bar of condonation continues only so long as the matrimonial conduct of the repentant spouse continues to be such as the Divorce Court can accept as consistent with matrimonial duty; and that when a fresh matrimonial wrong is done the condonation ceases to confer protection and the right of the other spouse to proceed in the Divorce Court revives.
>
> In my opinion, any other rule of law would not only be socially intolerable, but inconsistent with the real principle underlying the long line of cases and expressly mentioned in several of them, though in slightly varying language—namely, that there must be no substantial digression from

[8] This is well borne out by the discussion of the decisions in R. Cross, *op. cit.*, 8 MOD.L.REV. 149.

[9] *Higgins* v. *Higgins*, [1943] P. 58 (Pilcher J.); *Ainley* v. *Ainley*, [1945] P. 27 (Barnard J.); *Harrison* v. *Harrison*—unreported—(Wallington J.); *Beard* v *Beard* (1945), 61 T.L.R. 356 (Hodson J.).

> the path, to which their marriage vows have bound the parties, of what is sometimes called in old but telling words 'conjugal kindness'. A 'matrimonial' offence within the cognisance of the Divorce Court, in my opinion, simply means conduct which, in the eye of the Court, is wrong, whether it does or does not reach the duration, or gravity, or completeness which is necessary to permit of a decree, provided always that it be sufficiently serious for the Court to regard it as a substantial breach of duty.[10]

It is significant that in Australia the same process has ensued, but over a longer period of time, and in this connection it must be remembered that the Australian States have had grounds for divorce comparable with those contained in the English Act of 1937 since the last decade of the nineteenth century. The grounds for dissolution at the suit of either husband or wife include desertion for three years,[11] and adultery *simpliciter* as well as in its aggravated forms. In addition, there are other grounds such as habitual drunkenness, with either cruelty or neglect of domestic duties, repeated assaults and cruel beatings, and similar offences.[12]

Under the New South Wales statute [13] which, like English legislation and the Acts of other Australian States,[14] declares condonation to be an absolute bar,[15] the question of what conduct would revive condoned cruelty arose in 1897 in *Lewis* v. *Lewis*.[16] In that case desertion for three months was held to effect a revival, and in 1901 in *Murphy* v. *Murphy* [17] it was held that habitual drunkenness and cruelty which had been condoned were revived by a subsequent act of cruelty. Some years later the Victorian Supreme Court reached the same conclusion in *Strong* v. *Strong*,[18] but in the same year, 1910, the pendulum swung the opposite way in *Gorry* v. *Gorry*.[19] This swing was accentuated in 1912 when the Supreme Court of New South

[10] 61 T.L.R. at 559.
[11] Some States require desertion for five years, *e.g.*, South Australia and Queensland; one State (Tasmania) requires desertion for two years only.
[12] Joske, *Laws of Marriage and Divorce in Australia* (1936), 46–9.
[13] Matrimonial Causes Act, 1899, s. 18.
[14] Joske, *op. cit.* 214.
[15] The Acts of the various Australian States are not uniform in the offences which can be absolutely condoned; in all States, however, the local statute expressly deals with condonation of adultery and declares such condonation to be an absolute bar. Joske, *op. cit.* 214.
[16] 18 N.S.W.L.R. 19; cruelty was a ground for judicial separation under the statute then in force, the Divorce Amendment and Extension Act, 1892 (55 Vict. No. 37), s. 1.
[17] 19 W.N.(N.S.W.) 53.
[18] (1910), V.L.R. 122.
[19] 27 W.N.(N.S.W.) 183.

Wales in *DeLuca* v. *DeLuca*[20] held that nothing short of a matrimonial offence which was a ground for independent relief in the Divorce Courts would revive condoned adultery. The respondent's conduct in that case consisted of indecent familiarities with a maid-servant which fell far short of evidence of adultery but which, it was argued, sufficiently operated to revived the condoned adultery. Although Street J., in giving the judgment of the full Court, dealt fully with the effect of the Matrimonial Causes Act and the practice of the Ecclesiastical Courts, he did not overlook the fact that social interests were involved, and he conceived them to be as follows :—

> In the interests of society, as well as of that certainty which is or should be a feature of the law, it appears to me on principle to be sounder and wiser that it should be clearly understood that in suits for dissolution of marriage nothing short of conduct amounting in itself to an offence cognisable by the Court will be sufficient to revive a condoned offence, than that, by laying down a rule that misconduct falling short of this will suffice, an element of uncertainty and precariousness should be introduced, not only into the matrimonial life of the erring but forgiven party, but also into the administration of the law.[21]

This was accepted as the law in Australia for many years, and the principle of *DeLuca* v. *DeLuca* was applied in all States and was accepted as the prevailing rule of practice.[22] It was not until 1934 that the Australian Courts began to discard this principle, and a complete transition was not effected until 1945. The first departure from the *DeLuca Case* was made by the South Australian Supreme Court in *Hood* v. *Hood*,[23] where it was decided that desertion for six months revived condoned bigamous adultery. Napier, J., in whose judgment the other members of the Court concurred, said :—

> There is no reason why the reconciliation should not be regarded as an agreement with mutual obligations. The innocent party agrees to overlook what has happened, and the guilty party agrees to behave towards the other as he or she ' has a right to expect '. If any complaint is made of a breach of that agreement the Court should be able to

[20] 12 S.R.(N.S.W.) 619.
[21] *Ibid.* at 627. It is a novel proposition that the certainty of legal rules exerts any influence on the conduct of parties to a marriage, at any rate, so far as concerns their emotions and the question whether the erring spouse will agree to reform his ways.
[22] *E.g.*, *Crowder* v. *Crowder* (1920), W.A.L.R. 39; *Baker* v. *Baker*, 47 W.N. (N.S.W.) 5; *Deane* v. *Deane* (1929), Q.S.R. 124.
[23] (1934) S.A.S.R. 283.

> say whether the breach is one that ' goes to the root of the contract ' . . . . For that purpose it can look at the whole of the conduct of both parties, and say whether, in the circumstances of the particular case, the subsequent conduct of the guilty party shows such a repudiation of the marriage bond—and, therefore, of the agreement—as to justify the innocent party in resiling from the promise to forgive the past delinquencies. If the subsequent conduct amounts to a ' matrimonial offence ' it would seem that—*cadit quaestio*; but if not, regard should be had to the nature and quality of the conduct that is forgiven, and of the subsequent conduct, and to the interval during which there has been no cause of complaint. But if the Court should come to the conclusion that the guilty party has definitely repudiated the agreement, then justice and reason require that the innocent party should be absolved from the reciprocal obligation and be remitted to his or her former position.[24]

Though this decision was a strong affirmation that conduct not a ground for independent relief might revive a condoned offence, the position in Australia was not completely stabilised until the Victorian and New South Wales Courts fell into line. *Davies* v. *Davies*[25] represented the agreement of the Victorian Supreme Court with the reasoning of *Hood* v. *Hood*, and as recently as 1944 the Supreme Court of New South Wales in *Bridges* v. *Bridges*[26] overruled its earlier decision in *DeLuca* v. *DeLuca* and held that a course of conduct falling short of actual adultery, but indicating a predisposition towards the commission of adultery with the same person, was effective to revive adultery which had been previously condoned.

Although the conclusion of the three Judges who heard the appeal in this case was unanimous, they formulated slightly different tests to determine whether the conduct of a spouse whose previous guilt had been condoned would operate to revive the condoned offence. Jordan C.J. said that a revival would be effected by marital misconduct so serious in all the circumstances as to make it reasonable for an innocent spouse, wishing to maintain his self-respect, to withdraw from further cohabitation with the guilty spouse.[27] Davidson J. based his conclusion on the fact that the conduct alleged against the

[24] *Ibid.* at 295.
[25] (1942) V.L.R. 19; in that case Mann C.J. said ' the respondent's conduct was such as to make it entirely inconsistent with self-respect or safety for the petitioner to continue living with him '.
[26] 45 S.R.(N.S.W.) 164.
[27] *Ibid.* at 173.

respondent was ' of a type sufficiently serious to establish such a lack of recognition of marital obligations as to cause substantial injustice to the complaining party '.[28] The other member of the Court, Edwards J., considered that a revival would ensue from conduct which was not a ground for independent relief in the Divorce Court, but that the conduct must be ' both grave and weighty, repugnant not merely to the feelings of the condoned spouse but to the standards of conduct imposed on each of the spouses by the marital bond '.[29]

Whichever of these various formulæ be adopted three observations seem warranted. The first is that they all show a trend in the Australian cases closely similar to that manifest in the Court of Appeal decision in *Beard* v. *Beard*; Scott L.J. phrased the test as whether ' the matrimonial conduct of the repentant spouse continues to be such as the Divorce Court can accept as consistent with matrimonial duty '.[30] The second is that all of them enlarge the field of judicial discretion by removing the automatic test of whether the conduct proferred to destroy the bar would constitute an independent matrimonial offence. The third and final observation is, that in the field of choice thus created the Courts must willy-nilly find their grounds of decision in a consideration and adjustment of the interests at stake. It is diffidently suggested that, ordinarily, the following interests are involved :—

(a) The social interest in the stability of the family institution. This operates several ways :—
    (i) In so far as the revival of the condoned ground of divorce facilitates dissolution of the marriage, it operates against easy revival.
    (ii) In so far as condonation in lieu of divorce gives the marriage another chance, whichever rule as to revival results in the greater number of condonations is favoured by this same interest. In general, it is possible to say that more difficulty in revival of the old offence will tend to dissuade the injured spouse from any condonation at all; this, therefore, tends to favour easy revival.
    (iii) In so far as condonation gives the marriage another chance, this same interest suggests

[28] *Ibid.* at 178.
[29] *Ibid.* at 179; this test is similar to that formulated in *Yeatman* v. *Yeatman*, L.R. 1 P.&D. 489, as to what conduct justifies withdrawal from cohabitation and so constitutes a defence to a suit based on desertion or a restitution suit.
[30] 61 T.L.R. at 559.

that the guilty party should not be under so constant a threat of revival of the old offence as to render the relations of the reunion unstable and over-sensitive. This tends to favour more difficult revival.

(b) The social interest in the minimum life and happiness of spouses. This tends to favour easier revival as facilitating a dissolution if one spouse desires it.

(c) The social interest in the lives of dependants and the family. This tends to favour a more difficult rule of revival if it is considered after the offence has been condoned by a resumption of cohabitation because it supports a continuance of the marriage; on the other hand, this interest favours an easier revival if it is considered at an earlier stage, when the injured spouse is asking whether he or she should end the marriage or give it another chance by condoning his or her partner's conduct.

(d) The social interest in the general morals. This will usually favour easy revival as operating to deter the guilty party from further misconduct.

It will be obvious that the degree and direction of pressures of these various interests will rarely be alike in any two instances. A rule, therefore, which requires the Court to adjust them in the particular case is a rule requiring the Court to make an individualised application of justice to each marriage. The movement in Australian and English Courts towards this rule is, therefore, a movement to bring this part of the law of marriage out of the area of detailed rules into the area of individualisation of justice.

It has often been pointed out that the course of decision of Common Law Courts adapts the law to changed conditions, and moves in a manner which the reasons offered by the Courts would not lead one to expect.[31] It is but another illustration of this strange power of our Courts that in this field the judicial leaning coincides with much justice and sociological work stressing the importance, for instance, in the matter of matrimonial conciliation Courts, of recognising the unique feature of every marriage relationship.

R. ELSE MITCHELL.

[31] Stone, *Recent Trends in English Precedent* (1945), 000.

SPARE-TIME ACTIVITIES OF EMPLOYEES

QUESTIONS of great legal and sociological interest were at stake in *Hivac, Ltd.* v. *Park Royal Scientific Instruments, Ltd.*, [1946] 1 All E.R. 350. The plaintiffs were manufacturers of thermionic valves, including 'midget valves' which are used for hearing aids. At one time they were the only British firm to supply these midget valves with respect to which they seem to have enjoyed a monopoly in the British market. The defendants, two of whose directors had formerly held responsible positions in the employment of the plaintiffs, set up a manufacture of hearing aids, including midget valves, which they intended to put on the market at a price lower than that demanded by the plaintiffs. The assembling of midget valves—highly complicated instruments in a very small compass—requires the employment of the most skilled manual workers, of the sort of trained labour which can be expected to be scarce at almost any time and which, in war-time, must have been practically unobtainable. The plaintiffs' factory was a scheduled undertaking under the Essential Work Order.

According to the evidence before the Court of Appeal the defendant company and those associated with it induced five of the plaintiffs' highly skilled workmen to assist in the assembling of valves at the defendants' factory on Sundays, *i.e.*, during what was, from the plaintiffs' point of view, the workers' spare time. The workmen did not, according to their own affidavits, receive any wages from the defendants, but 'payment by way of expenses for their work'. Morton L.J. was not 'quite sure what that means'. One may be permitted to suspect that here, as so often in different contexts, the term 'expenses' was tainted by a hue of deliberate ambiguity.

The plaintiffs asked for, and obtained from the Court of Appeal (reversing an order of Cohen J.) an interlocutory injunction restraining the defendants from continuing what in the view of the Court amounted to an inducement to commit a breach of contract. The workmen themselves were not parties to the suit.

The question—the decisive question—whether the workmen's conduct was a breach of their contract of employment with the plaintiffs was answered in the affirmative by the

Court of Appeal. It was a case *primæ impressionis*. In the submission of the present writer the decision of the Court was manifestly right, but it was arrived at with great hesitation and with that most scrupulous weighing of the arguments in favour and against an even limited legal control of a workman's spare-time activities which the importance of the matter clearly deserved. Had there been a disclosure of confidential information on the part of the workmen, there would have been hardly any problem at all, but, according to the evidence, no such information had passed from the workmen to the defendants. Hence, the Court had to face the problem in its full magnitude: is it—or can it be—an implied term of the contract of employment of a manual workman that he must not, during 'his own time' assist his employer's competitor?

This question can be approached from two different angles: It might be argued that an obligation to abstain from work during leisure hours can be spelled out of the contract of service with the result that any kind of gainful employment during a worker's spare time would be a breach of contract. This line of reasoning was rejected by the Master of the Rolls. The Court of Appeal saw the breach of contract not in the fact that the five workmen used 'their own time' for work instead of recreation, but in the assistance they gave to their employer's competitor. The case was decided on the ground that there is implied in every contract of employment a duty of fidelity which the employee owes to the employer. This is well established, although the Courts have fortunately been anxious to circumscribe this duty within narrow limits. It is obvious that the extent to which an employee's freedom of action is restricted by the fidelity owing to his employer must vary from case to case. The higher the position of the employee in the organisation of the undertaking, the greater must be his duty of fidelity. A man entrusted with responsible work, a factory manager, a confidential secretary, or—to use an example given by the Master of the Rolls—a solicitor's clerk, is bound by more stringent obligations in this respect than, say, an unskilled operative, a shop assistant or an office boy. The duty of fidelity arises from the employment relation as such, but its scope is determined by the character of the work. There is always a danger of blurring the line between 'fidelity' and 'fealty', of 'feudalising' the contract of employment by linking the employee's obligation not to violate his employer's interests with an act of submission to those interests on his part, instead of rooting it

in the character of the work he is liable to do. *Vestigia terrent.* Recent developments on the Continent have taught the world a lesson about the political implications of the feudalisation of employment.

The Court of Appeal has avoided this pitfall. Both the Master of the Rolls and Morton L.J. (Bucknill L.J. merely expressed his assent) refused 'to express any view of such a general nature as that all work done for a firm in the same line of business as the employers in the spare time of the employees is a breach of contract'. The duty of fidelity with regard to abstention from competition was not formulated in the abstract. Morton L.J. emphasised four factual elements: the inevitable damage to the employer, the secrecy maintained by the workmen (pointing, as it were, to a *mens rea*), (most important) the skilled nature of their work, and the risk that, though this had not actually happened in the past, the activities of the workmen might lead to the communication of confidential information to the defendants. Similarly, the Master of the Rolls deprecated any attempt to define the 'vague duty of fidelity' and pointed to its connection with the character of the work done. No general principle as to abstention from competition during leisure hours was formulated, and the decision thus boiled down to a slight but important extension of the principle of cases such as *Wessex Dairies, Ltd.* v. *Smith,* [1935] 2 K.B. 80, in which certain types of competitive acts done during the employer's time had been stigmatised as breaches of the duty of fidelity. It appears that the solution of the problem tentatively suggested by Batt (*Law of Master and Servant* (3rd ed.), p. 146) has found favour with the Court of Appeal.

On the most important point, the freedom of the employee to use his leisure time as he pleases, the language used by the Master of the Rolls in the case under review is very emphatic: 'The law would, I think, be jealous of attempting to impose on a manual worker restrictions the real effect of which would be to prevent him utilising his spare time. He is paid for five-and-a-half days in the week. The rest of the week is his own, and to impose upon a man, in relation to the rest of the week, some kind of obligation which really would unreasonably tie his hands and prevent him adding to his weekly money during that time would, I think, be very undesirable.' Again: 'It would be most unfortunate if anything we said, or any other court said, should place an undue restriction on the right of the workman, particularly a manual

workman, to make use of his leisure hours for his profit.' The employee does not, by an implied term of the contract, put the whole of his strength at his employer's disposal. The employer does not, by the contract of employment, acquire a legally guaranteed interest in the 're-production' of his workers' labour power by recreation and abstention from work during the latter's spare time. If the employer wishes to achieve this result, he must, and may, do so by an express stipulation in the contract. Where a relevant collective agreement contains a provision to this effect, it will presumably become part of the contract of employment as a trade usage.

This, however, does not conclude the matter. What, it may be asked, is the inter-relation between this principle of the common law and that body of legislation which puts a limit upon an employee's working hours? English statute law does not establish a general maximum day for adult male workers, but it does regulate the working hours of certain categories, the most important of which are mineworkers below ground (Coal Mines Regulation Act, 1908, as amended by Coal Mines Act, 1930), and drivers of various kinds of heavy motor vehicles (public service vehicles such as buses and coaches, goods vehicles, and some others) (Road Traffic Act, 1930, s. 19, as amended by Road and Rail Traffic Act, 1933, s. 31, and by Road Traffic Act, 1934, s. 7). In both cases the maximum hour norm is addressed to the employer as well as to the employee. A coal miner who remains below ground for more than the statutory seven-and-a-half hours commits a criminal offence no less than the owner or manager who causes or permits him to do so (sections 1 and 7 of the Act of 1908). A lorry driver or bus driver who drives a vehicle for a continuous period of more than five-and-a-half hours or during the statutory ten 'hours for rest' in each twenty-four-hour period can be fined as can his employer who tolerates this contravention of the statute (section 19 of the Act of 1930). There is, however, nothing to prevent the coal miner or the lorry driver from doing heavy agricultural work outside his working hours and thus to frustrate one of the objects of the statute, *viz.*, to secure to him a period of rest. The hours of drivers of motor vehicles have been restricted 'with a view to protecting the public against the risks which arise in cases where the drivers of motor vehicles are suffering from excessive fatigue'. It is therefore in their case, and as far as the present writer is aware, in their case alone, that the law has ventured on a definition of what are or, rather, what are *not*

'hours for rest'. A driver is not at rest at any time during which he 'is bound by the terms of his employment to obey the directions of his employer, or to remain on or near the vehicle, or during which the vehicle is at a place where no reasonable facilities exist for the driver to rest away from the vehicle' (1933 Act, s. 31 (1)). He is 'at rest' if he does outside work. The law does not pry into the spare-time activities even of those workers whose opportunities for recreation are a matter of public safety.

If we turn to the statutory provisions which limit the hours of work of women and of young persons—far more numerous and extensive in application than those concerned with adult men—we find that they are addressed to the employer (or the 'occupier' of a factory) only and not to the employee. In the case of factory legislation the law makes it virtually impossible for a woman or a young person under eighteen to be employed in one factory during what are leisure hours from the point of view of another factory. They must not be employed in a factory on Saturday afternoons or at night (section 70 (*b*) of the Factories Act, 1937) or on Sundays (section 77) and therefore cannot use these periods for gainful employment in a factory. Moreover, the combined effect of the maximum 'spread-over' of eleven hours (section 70 (*b*)) and of the principle of continuous employment (section 70 (*d*)) precludes a woman or young person from seeking occupation in a factory during 'leisure hours'. The principle of continuous employment—in many ways one of the corner stones of factory legislation—compels the employer (occupier) to employ all women and young persons in one factory at the same time. If, therefore, the spread-over in factory X is from 7 a.m. to 6 p.m. and in factory Y from 8 a.m. to 7 p.m., it is illegal for the occupier of factory Y to employ a female worker of factory X from 6 to 7 p.m. It will be seen that the law achieves its aim of preventing the migration of workers from one factory to another by a series of norms addressed to the employer himself. But—and this is the important point—quite apart from the numerous exceptions contained in the Factories Act itself, there is nothing to preclude a woman or young person from being gainfully employed during leisure hours in any business not carried on by the occupier of the factory (section 75 of the Act).

With respect to young persons the risk of frustrating the purposes of the hours-of-work legislation is much reduced by

section 1 (4) of the Shops Act, 1934. No young person must be employed about the business of a shop if, to the knowledge of the occupier of the shop, he has on the same day already reached the maximum of permitted hours in a factory.

It would be possible to pursue this inquiry through other branches of hours-of-work legislation, such as the Metalliferous Mines Regulation Act, 1872, the Shops Acts, and the Young Persons (Employment) Act, 1938, but the result would be the same; there is only a very limited guarantee against multiple employment.

The question, therefore, arises why it is that the law has done so little to protect the employee against the temptation of using his spare time for work instead of recreation. The answer is obvious. It is impractical to try to enforce legislation of this kind against the individual worker. In a democratic community the use of a person's leisure hours lies beyond the border of the province of the law. Nothing can enforce standards of conduct in this respect save the self-imposed discipline of the working class mediated through the mechanism of the trade unions. It is for the trade unions to see to it that the freedom to use for work what should be a period of rest is not abused by the individual. In this case as in so many others, trade union action, far from running counter to the establishment of statutory standards, is indispensable in order to make them effective.

This is particularly true in conditions of full employment. Problems such as those before the Court of Appeal have not hitherto engaged the attention of the Courts because the temptation to which the five workmen employed by the plaintiffs succumbed will only rarely exist where labour is easily and readily obtainable. The case under discussion enables us to cast a first glance at some of the questions of labour law which arise in conditions of full employment.

Full employment, according to the definition of Sir William Beveridge (*Full Employment in a Free Society*, pp. 18 and 19, Nos. 4 and 5), means 'having always more vacant jobs than unemployed men, not slightly fewer jobs'. 'The proposition that there should always be more vacant jobs than unemployed men means that the labour market should always be a seller's market rather than a buyer's market.' The situation before the Court of Appeal in the instant case was, it is submitted, not, as the Master of the Rolls put it, merely an outcome of 'peculiar times'. Indeed, the repeated emphasis laid by the Master of the Rolls on the abnormal character of

the situation shows how much the thinking of eminent judges no less than that of employers, trade unionists, and others is still permeated with the unstated assumption of unemployment. 'In normal times, if it had not been for war and post-war conditions and regulations, this particular controversy would never have sprung up, because the plaintiffs would have had in their hands the obvious remedy of discharging the employees in question and replacing them with others more trustworthy.' 'In normal times . . . these employees could have been got rid of on twenty-four hours' notice, and no doubt there were skilled people who could have been obtained to take their place.' The subconscious mind of most of us still conceives of 'normal times' as times in which the supply in the labour market exceeds the demand. Even our legal ideas are still largely shaped by this assumption. Once we have grasped the implications of the fact that not unemployment, but full employment (as defined by Sir William Beveridge) is to be the normal state of affairs, we shall be prepared to see in the principles laid down by the Court of Appeal a matter of eminent practical significance. The refusal of the common law to interfere with the use of the worker's spare time (apart from cases of unfair competition) side by side with the corresponding abstemiousness of statute law, must be welcomed. But, given full employment and the temptations it offers to the individual worker, this self-restraint of the law would be not beneficial but detrimental without an understanding and effective trade union policy.

It is perhaps not without interest that the legal problems which were before the Court of Appeal have been the subject-matter of some difference of opinion in France and in Germany.

The legal prohibition of competitive activities, at any rate in the case of salaried commercial employees, has a very long history on the Continent. It goes back to the commercial law of medieval Italy, and Goldschmidt, *Universalgeschichte des Handelsrechts* (p. 249, note 44) quotes a law of the cloth makers' guild of Florence of 1301 to this effect. But the principle did not find its way into the French Codes. Neither the *Code Civil* nor the *Code du Travail* nor the *Code de Commerce* contains any express provision dealing either with the employee's duty of fidelity or with the use of his leisure hours, but the *Cour de Cassation* solved the problem in a manner similar to that adopted by the Court of Appeal. In *Perrin* c. *Vidal* (18.1.16, Dalloz, 1918 I, 41) the highest French

Court decided that it was not of the essence of a contract of employment that the employee should put the whole of his work and of his time at the disposal of the employer. More than that: the Court held that an employee whose time was not entirely taken up by his duties was free to devote his spare time to other work, but only to work of a different nature, which could not have any prejudicial effect upon the business of the employer. In a Note to this decision Louis Sarrut calls the principle that the employee is free to dispose of his spare time '*pas sérieusement contestable*', and expresses his substantial agreement with the limitation imposed upon the principle by the Court. It is easy to see that this limitation is somewhat more stringent than that imposed by the Court of Appeal but that the general approach to the problem is the same. In view of this decision it is perhaps a little surprising to find that Planiol and Ripert (*Traité Pratique de Droit Civil Français*, 1932, vol. XI, No. 845, p. 78) reject the view of the *Cour de Cassation* (without mentioning the decision) and with it the rule which Sarrut had called incontrovertible. Quoting two decisions of lower Courts of 1860 and of 1899, Planiol and Ripert argue that, as a matter of principle, an employee is in the service of one employer only, that he must not accept work from any other employer (without the former's consent), and that all this follows from the duty of fidelity owing by the employee to the employer. The hours of rest, they say, which have been given to the employee by contract or statute, are intended to allow him to live his life with his family '*et de refaire ses forces, en vue de fournir un meilleur travail*'. It is true that they somewhat restrict this extreme view by pointing out that there would be a breach of contract only if the work was '*pénible*' (and of course always if it was competitive), also that usage frequently permits more latitude. Nevertheless, this leading French treatise propounds that very 'reproductive' theory of leisure time which has been rejected by the Court of Appeal and its conflict of opinion with the *Cour de Cassation* illustrates the difficulty of the problem.

The German Commercial Code of 1897 provides in section 60 that a salaried employee charged with 'commercial' as distinguished from 'technical' duties must not, without the employer's consent, set up a commercial business of any kind or enter into commercial transactions in his employer's line of business either for his own or any other person's account. The Code permits the use of the employee's spare time for gainful employment, provided it is not

commercial 'self-employment' of any kind or competitive from the employer's point of view. There is nothing in German statute law to place any limitations on the spare-time activities of technical salaried employees, manual workers, etc. The *Reichsgericht* (RGZ, vol. 72, p. 393) refused to place any restraint on the use of an employee's leisure time as such and decided that he was free to accept gainful employment, but it is *communis opinio* that even outside the field of application of the Commercial Code an employee must refrain from competing with his employer in such a way as to inflict harm on his business, at any rate if the employee belongs to one of the more highly paid categories. This is a cautious inference from the general duty of fidelity owing by the employee to the employer (see Hueck-Nipperdey, *Lehrbuch des Arbeitsrechts* 1927, vol. I, p. 162). German legal doctrine and case law under the influence of Gierke and Sinzheimer tended to emphasise the 'personal' as distinguished from the 'obligatory' element of the employment relationship. Nevertheless, the practical conclusions it reached with regard to the duty of fidelity and its extent are not dissimilar from those found in this country and in France. In the opinion of some learned writers it might be a breach of contract for an employee to use his strength on outside work to such an extent as to impair his ability to perform his contractual duties, and one author (Oertmann, *Deutsches Arbeitsvertragsrecht*, p. 190) points to the shortening of working hours, to the eight-hour day and its social purposes as an argument in favour of this doctrine. The present writer is not aware of any decision to this effect.

O. KAHN-FREUND.

SOLOMONS *v.* ROSS AND INTERNATIONAL BANKRUPTCY LAW

Solomons v. *Ross*,[1] the leading case on the effect in England of bankruptcy declared abroad, has played an important part in the evolution of international bankruptcy law. From *Solomons* v. *Ross*, decided in 1764, it was concluded that the doctrine of ubiquity of bankruptcy is part of English law. Beginning with Savigny,[2] who relied on Story [3] for his information, the supporters of the theory that bankruptcy declared at the domicil of the debtor must be recognised everywhere,[4] have referred to the position taken by the English Courts. Objection to the doctrine of ubiquity, on the other hand, led to the refusal of the Courts in the United States [5] to follow *Solomons* v. *Ross*.

In *Solomons* v. *Ross* trustees in bankruptcy appointed in Amsterdam were allowed to collect assets in England which had been garnished by an English creditor shortly before the trustees were appointed in Amsterdam. The case is known from Henry Blackstone's *Reports*. Because of the scantiness of the report the House of Lords in a relatively recent decision [6] refused to accept and act upon the case.

There is another report on *Solomons* v. *Ross* which has become available only a quarter of a century after the case was decided. This report, which seems to have gone unnoticed, furnishes additional information on the case and permits a more precise evaluation of the decision. Because of this, and of the increasing importance of the question of the extraterri-

[1] 1 H.Bl. 131, note.

[2] F. K. von Savigny, *System des heutigen römischen Rechts*, Vol. VIII (1849), s. 374 note (*mm*); in Guthrie's translation published under the title *Treatise on the Conflict of Laws* (2nd ed. 1880), at p. 262.

[3] Story's *Commentaries on the Conflict of Laws* were published in 1839.

[4] The supporters of the theory of ubiquity are listed in C. Valensi's article 'Faillite' in Lapradelle-Niboyet, *Répertoire de Droit International*, Vol. VIII (1930), pp. 286 ff., at p. 291.

[5] *Harrison* v. *Sterry* (U.S. 1809), 5 Cranch 289, at p. 302, *per* Marshall C.J.; *Taylor* v. *Geary* (Conn. 1787), Kirby 313; *Blake* v. *Williams* (Mass. 1828), 6 Pick. 286; *Wallace* v. *Patterson* (Md. 1790), 2 H.&McHen. 463; *Saunders* v. *Williams* (1830), 5 N.H. 213; *Abraham* v. *Plestoro* (N.Y. 1829), 3 Wend. 538; *McNeil* v. *Colquhoon* (1797), 2 N.C. 24; *Milne* v. *Moreton* (Pa. 1814), 6 Binn. 353; *Topham* v. *Chapman* (S.C. 1817), 1 Mill. 283. *Contra*: *Holmes* v. *Remsen* (N.Y. 1820), 4 Johns.Ch.R. 460, *per* Chancellor Kent. Cf. J. Kent, *Commentaries on American Law* (14th ed. 1896), Vol. II, at p. 406; J. Story, *Commentaries on the Conflict of Laws* (8th ed. 1883), at p. 572.

[6] *Gailbraith* v. *Grimshaw*, [1910] A.C. 508, at p. 511.

torial effect of bankruptcy in an era of expanding international commerce, the decision warrants re-examination with due regard to present-day conditions.

Solomons v. *Ross*, decided by Justice Bathurst in 1764, is reported in Henry Blackstone's *Reports* in a note to *Folliott* v. *Ogden*,[7] which was before Lord Loughborough in 1789. The same note reports two other decisions rendered in favour of foreign trustees in bankruptcy; one is an English decision, *Jollet* v. *Deponthieu*,[8] decided by Lord Chancellor Camden in 1769, which again involved Dutch trustees in bankruptcy who claimed assets that were garnished after the Dutch declaration of bankruptcy; the other is Irish, *Neale* v. *Cottingham*,[9] before Lord Lifford, in which an Irish creditor was ordered to refund to English trustees in bankruptcy money which he had obtained by garnishee proceedings begun after the bankruptcy declaration in England. The date of the Irish decision, according to the note in Blackstone's *Reports*, is November 16, 1764. This date is incorrect. Proceedings were begun on that date, but the case was decided on July 16, 1770, six years after *Solomons* v. *Ross*. Finley's *Digest and Index of the Irish Reports*, published in 1830, reports the case from manuscript.[10] Another report of *Neale* v. *Cottingham* is contained in Wallis' *Irish Chancery Reports*, published by Lyne in 1839.[11] Wallis' *Reports* present the arguments and the opinions of Lord Lifford and the two judges whom the Lord Chancellor had called to his assistance. The plaintiff in the case, the English trustee, relied upon *Solomons* v. *Ross* for his claim for the funds obtained by an Irish creditor after the bankruptcy declaration. A report of *Solomons* v. *Ross*[12] appears in a note[13] to the case. The data on *Solomons* v. *Ross* in Wallis' *Reports* are in accordance with those in Blackstone's *Reports*, but more explicit.

The following is a summary of the facts in *Solomons* v. *Ross* as taken from Blackstone's *Reports*. On December 18, 1759, the Amsterdam merchants Deneufville stopped payment. On January 2, 1760, ' curators ' of their property were appointed

[7] 1 H.Bl. 123.
[8] 1 H.Bl. 132, note.
[9] 1 H.Bl. 132, note.
[10] At p. 36, note.
[11] At p. 54.
[12] *Israel Levy Solomon (sic), Jolle Jolles and Johannes Rickveit* v. *Michael Solomon (sic), Hugh Ross, and Wynand and David Deneufville*, Wallis-Lyne, *Irish Chancery Reports*, 59, note.
[13] An editorial states, *eodem*, that *Solomon* v. *Ross* was given in a note to Mr. Wallis' MS. without indication of the source.

by the Chamber of Desolate Estates in Amsterdam. Previously, on December 20, 1759, Ross, an English creditor, had garnished £1,200 in the hands of Michael Solomons in London which were due from Solomons to the Deneufville. In March, 1760, Ross obtained judgment by default on the garnishment, whereupon a writ of execution issued against Michael Solomons. Being unable to pay, Michael Solomons gave Ross a promissory note for the amount of the judgment. In proceedings brought by the Dutch 'curators' it was held that Michael Solomons must pay the £1,200 to the 'curators', and that Ross must surrender the promissory note to Michael Solomons.

The note in Wallis' *Reports* corroborates these facts. Shortly before their failure, the Deneufville had accepted bills drawn upon them by Ross to the amount of £1,200, due December 19. On the other hand, on the fourteenth of that month the Deneufville had drawn bills upon Ross in favour of Michael Solomons for £1,300 payable in February, 1760, which were duly accepted by Ross. At the failure of the Deneufville the bills drawn by Ross upon them were returned protested. Ross was obliged to discharge their drafts for £1,300 drawn upon him in favour of Michael Solomons. As soon as Michael Solomons had received this money to the use of the Deneufville, Ross instituted suit in the Lord Mayor's Court against the Deneufville, and by foreign attachment garnished the £1,300 in the hands of Michael Solomons. Upon execution, Michael Solomons gave him his promissory note for £1,200.

The Dutch 'curators' of the Deneufville bankrupt estate, Jolle Jolles and Johannes Rickvett,[14] designated Israel Levy Solomons their attorney to collect such of the bankrupt's effects as were situated in England. Through Israel Levy Solomons they entered suit in the Chancery asking that Michael Solomons might account for the bankrupt's effects in his hands at the time of the Deneufville failure, and might pay over the same to the 'curators' for the benefit of all the creditors. They also asked that Ross might be restrained from getting the effects into his hands under the note passed to him by Michael Solomons. The latter requested and was permitted to deposit the money due by him in the Bank of England for the use of the party having right thereto. The cause was afterwards heard by Justice Bathurst, in the absence of the Lord Chan-

[14] Apparently the same persons as in the second Deneufville insolvency case, *Jollet* v. *Depontl:eu*, *supra*, note 8.

cellor, and the Court rendered its decree in favour of the Dutch ' curators '.

According to the note in Wallis' *Reports*, the case was decided ' upon the pleadings, and upon proof of the laws and usage of Amsterdam, and of the Chamber of Desolate Estates there, and of their admitting foreign creditors to share equally in the dividends, and upon proof of the bankruptcy '. The note begins with a statement dealing with the Chamber of Desolate Estates in Amsterdam :—

> By the constitution of the city of Amsterdam, allowed by the law of that province, and confirmed by the States General of the same, there is a court established, called the Chamber of Desolate Estates; who, upon a trader's absconding, refusing to pay his debts, or upon his own application, declaring himself unable to pay, have authority to take into their hands all his effects and debts wheresoever found; and then to appoint curators, in nature of our assignees, for the preservation of those effects for the benefit of all creditors. After this, the creditors are summoned, and the bankrupt is brought before the Chamber, together with his creditors, and if he can agree with them, and secure them their demands, or such part as they agree to accept, the effects are restored unto him; but if he cannot thus act, the effects are directed to be sold for the benefit of all creditors, and for their proportionate dividends of this fund, all foreign creditors are allowed to come in; and letters have been often sent from that Chamber to the Lord Mayor of London, requiring him to summon such English creditors; and it is looked in Amsterdam that all the foreign effects of such bankrupt, wherever situate, become vested in the Chamber upon the bankruptcy, and therefore, they admit foreign creditors to come in equally with natives.

So much for the contents of the note on *Solomons* v. *Ross* in Wallis' *Reports*. We may add that at the time of *Solomons* v. *Ross* an English translation of the Regulations for the Chamber of Desolate Estates in Amsterdam was available in London. Wyndham Beawes had reproduced the text in English in his *Lex Mercatoria Rediviva*[15] published in 1752. The Regulations provided that the curators appointed by the Commissioners of the Chamber ' shall endeavour to secure all the estates, effects, and debts, belonging to the said funds, whether within or without the jurisdiction of that city *or of this*

[15] At pp. 563 ff.

country'.[16] They also provided that the Commissioners shall appoint a day for the proof of claims, 'by which day all the known creditors inhabiting this city shall be summoned by the usual citation, *those abroad by letter of advice*'.[17] The Regulations did not stipulate that there was a relation back, as in English law, for the beginning of the effects of a bankruptcy adjudication. The sentence in Blackstone's *Reports* which immediately follows the statement of the second Deneufville case, *Jollet* v. *Deponthieu*, probably refers to the absence of such a rule: 'It appears from the proofs taken in the cause that a bankrupt's effects, by the law of Holland, vest in the curators only from the time of their being appointed, and not by relation to the time of the committing of the act of bankruptcy'.[18]

There were several issues involved in *Solomons* v. *Ross*. Was a Dutch trustee in bankruptcy at all entitled in the English Courts to claim funds located in England? Was such a claim blocked by the garnishment of the funds by Ross? According to the account in Wallis' *Reports*, a further question which was raised was: Would Ross receive his equal share in the distribution of the assets in Amsterdam?

Of the first two questions the more intricate was the effect of Ross' garnishment of the funds. The note in Wallis' *Reports* does not indicate, at least not directly, why the Court gave the funds to the Dutch trustees in bankruptcy although they were garnished by Ross.[19] An indirect answer may be found in the reference to the 'laws and usage of Amsterdam' upon which, according to the note, the Court rendered its decision. Under Dutch law Ross would not have acquired any preference by garnishment proceedings. This is the result not of a rule in Dutch bankruptcy law, but due to the fact that under Dutch law attachments or garnishments did not give a preference to the attaching creditor over non-attaching or later-attaching creditors. Any creditor who filed his claim could share in the proceeds of executions proportionately. 'Equity

[16] Instructions and Orders for the Commissioners of the Desolate or Ruined Estates, s. 5; *Groot Placaat Boek*, Vol. IV, at p. 479. Italics supplied.

[17] Instructions and Orders, s. 17, *eodem*. Italics supplied.

[18] 1 H.Bl. 132, note.

[19] In 1711 and 1715, respectively, Lord Raymond and Sir Joseph Jekyll, when at the bar, had given opinions to the effect that the law of England takes no notice of a commission in Holland and that, therefore, the creditors in England may attach the effects in the City of London and proceed to condemnation. Opinions published in J. M. Barels, *Advysen over den Koophandel en zeevaert*, Vol. II (1781), at pp. 297, 308; reproduced in J. Henry, *The Judgment of the Court of Demerara in Odwin* v. *Forbes* (1823), Appendix D, at pp. 251 ff.

favours the diligent ' is not a maxim originating in Roman law. The ' priority ' system was not part of the Roman law applied in Holland, neither was it incorporated in Dutch statutory law.[20] When bankruptcy occurred after an attachment, the attached goods were simply taken over by the trustee in bankruptcy as a part of the bankrupt's estate.[21]

Today, too, the ' equality ' rule governs executions in various civil law countries, for example, in the Netherlands, France, Belgium, Italy.[22] The ' race of diligence ' system is in force in Germany, Austria and Scandinavia.[23] The fact that there are these two different systems is of importance in considering the possibility of achieving equality in international bankruptcy cases. At present, many countries do not recognise the effects of a foreign bankruptcy declaration,[24] or they recognise them only after the grant of an exequatur [25] which has no retroactive effect.[26] If a country which does not recognise a foreign bankruptcy belongs to the group applying the equality rule in executions, equal distribution can nevertheless be achieved. If the country applies the priority system, there will be inequality, and the local creditors, who are generally the first to attach,[27] will be favoured. Redress is possible if a local bankruptcy declaration can be obtained.[28] Presence of assets alone is not sufficient everywhere to give bankruptcy jurisdiction.[29]

[20] Matthaeus, *De auctionibus* (1653), l. 1, c. 19, s. 63; Huber, *The Jurisprudence of my Time* (1686), in Gane's translation, 1939, Vol. I, at p. 368; Joh. Voet, *Ad Pandectas* (1698), l. 2, t. 4, s. 64; van der Linden, *Korte Schete van den Form van Procedeeren* (1781), at p. 128.

[21] See, however, van der Linden, *Verhandeling over de Judicieele Practicque of Form van Procedeeren*, Vol. II (1798), at p. 102–103, regarding judicial liens resulting from attachment in execution proceedings.

[22] Code of Civil Procedure of the Netherlands : s. 457 ff., 480 ff.; of France : s. 610, 656 ff.; of Belgium : s. 609, 656 ff.; of Italy : s. 646, 651.

[23] German Code of Civil Procedure, s. 804 (3); Austrian Code of Executions, s. 256, 300; Swedish Execution Law, s. 58.

[24] In Europe, *e.g.*, Germany, the Netherlands, Sweden, Switzerland. References in K. H. Nadelmann, ' International Bankruptcy Law : Its Present Status ', in 5 *University of Toronto Law Journal* (1944), at pp. 324 ff., 18 *Journal of the National Association of Referees in Bankruptcy* (1944), at pp. 104 ff.

[25] *E.g.*, France, Spain. References : *eodem*.

[26] French Cour de Cassation, June 26, 1905, Sirey, 1905, 1, 433, Dalloz, 1905, 1, 517, Clunet, 1905, 1014 (set-off made after bankruptcy declaration but before grant of *exequatur* held valid). Appeal Paris, June 1, 1906, Dalloz, 1909, 2, 9, Clunet, 1907, 135 (attachment before *exequatur* held valid).

[27] ' And because oftentimes creditors in regard they live at distance or upon other occasions are prejudged and preveened by the more timeous diligence of other creditors, so that before they can know the condition of the common debtor, his estate is comprised . . . '. Act for ordering the payment of debts between creditor and debtor. Charles 2, 1661, c. 62.

[28] Cf. *Dulaney* v. *Merry & Son*, [1901] 1 K.B. 536, 544, where this point was considered.

[29] In Austria, presence of assets is sufficient to give bankruptcy jurisdiction : Bankruptcy Act of 1914, s. 63. Same : U.S. Bankruptcy Act, 1898, s. 2 (*a*) (1). *infra*, note 58. In Germany, domicil, a local commercial establishment, or a

Returning to *Solomons* v. *Ross*, Ross would not have acquired under Dutch law a preference by attachment proceedings. Ross' attachment would not have given him a preference under English law either, assuming that bankruptcy had been declared in England. The bankruptcy statute of 1623 denied a preference to attachments not fully executed at the time of the bankruptcy.[30] Here was, therefore, a situation where the attachment would not have given a preference under either law, Dutch or English, had bankruptcy been declared and the attachment made in the same country. The decision shows that the Court would not allow the attaching creditor to retain his preference just because bankruptcy and attachment occurred in different countries.[31] By what reasoning the Court reached its decision remains a matter of conjecture. The Court recognised that the Deneufville were in bankruptcy. It may have evaluated the effects of the attachment on the basis of Dutch law, or it may have construed the provision in the statute of 1623 as expressing a general principle of law, applicable irrespective of whether bankrupty was declared in England or abroad.[32]

The Dutch trustees in bankruptcy had power under Dutch law to claim assets of the estate located abroad. The note in Wallis' *Reports* does not reveal upon what theory the Court recognised that power. According to Lord Loughborough,[33] who had been counsel in *Solomons* v. *Ross*, the case was decided upon the principle 'that the assignment of the bankrupt's effects to the curators of Desolate Estates in Holland was an assignment for valuable consideration, and therefore acknowledged in this country, agreeable to *Captain Wilson's Case*[34] in the House of Lords'. A variety of other

rural estate are prerequisites : Bankruptcy Code, ss. 71, 238. For the English law, see Bankruptcy Act, 1914, ss. 1 (2), 4 (1) (*d*).

[30] 21 Jac. 1, c. 19, s. 9. 2 Bl. Comm. *486. A. Cullen, *Principles of the Bankrupt Law* (1800), at p. 242.

[31] In *Gailbraith* v. *Grimshaw*, [1910] A.C. 508, the House of Lords held for the attaching creditor in a case where goods had been attached in England shortly before bankruptcy was declared in Scotland, and where the attachment would have been void under Scottish law. (The foreign trustee in bankruptcy was said to be 'sitting between two stools', *eodem*, at p. 510, *per* Lord Loreburn.)

[32] Cf. *Wylie* v. *Anderson* (April 5, 1797), in the Lord Mayor's Court, where a foreign attachment followed by a sequestration order in Scotland, was held defeated as being but an incipient lien. J. Locke, *Foreign Attachments* (1853), at p. 36, note (*p*).

[33] 1 H.Bl. 131.

[34] *Captain Wilson's Case* was before the Courts in England and Scotland shortly before *Solomons* v. *Ross*. Wilson had been declared bankrupt in England. Subsequently, Scottish creditors holding English claims attached assets in Scotland. The Court of Session, by a majority decision, decided in favour of the English trustee in bankruptcy claiming the assets. *Bradshow and Ross*,

constructions have been suggested,[35] the prevailing one being that 'the English Courts have consistently applied the doctrine of universality according to which they hold that all movable property, no matter where it may be situated at the time of the assignment by the foreign law, passes to the trustee'[36] American Courts, too, referring to the 'comity of nations', have allowed foreign trustees in bankruptcy to sue for assets not attached by local creditors.[37]

The account in Wallis' *Reports* does not indicate that the question of reciprocity has played a part in the decision of *Solomons* v. *Ross*. Lord Loughborough's reference to the *Wilson Case* could imply it. Reciprocity may have been expected from the Dutch Courts. In fact, in South Africa the Courts hold on the basis of Roman-Dutch law, by applying the fiction 'mobilia sequuntur', that movables wherever situated vest in the trustee in bankruptcy appointed by the Court of the debtor's domicil.[38] It has always been a moot question, however, whether that fiction[39] should apply also to bankruptcy.[40]

While the report does not elucidate on the subject of reciprocity it is explicit on another point. We learn that proof was submitted to the Court that in Dutch bankruptcy proceedings foreign creditors shared equally with domestic creditors. This fact is emphasised in the report. The conclusion can be drawn that Justice Bathurst did not feel bound to give the local assets to the foreign trustees in any circumstance. Guarantee of equal treatment abroad for the English

assignees of Wilson v. *Fairholme*, July 6, 1758, 1 Faculty Collection 200, 1 Kames' Select Decisions 106, Brown's *Supplement to the Dictionary of Decisions*, Vol. V, at p. 283 (Lord Kilkerran), pp. 821, 839 (Lord Monboddo). Cf. 1 H.Bl. 691.

[35] See *Hunter* v. *Potts* (1791), 4 TermRep. 182; *Sill* v. *Worswick* (1791), 1 H.Bl. 665; *Philips* v. *Hunter* (1795), 2 H.Bl. 402. Cf. J. Story, *op. cit.*, ss. 404 ff.

[36] G. C. Cheshire, *Private International Law* (2nd ed. 1938), at p. 478.

[37] *Matter of Accounting of Waite* (1885), 99 N.Y. 433, 448, overruling *Mosselman* v. *Caen* (1861), 34 Barb. 66; *Long* v. *Girdwood* (1892), 150 Pa.St. 413, 420; *Maconchy* v. *Delehanty* (1908), 11 Ariz. 366 (not extended to include local land).

[38] *Howse, Sons & Co.'s Trustee* v. *Howse, Sons & Co.'s Trustees* (1884), 3 S.C. 14; *Ex p. Stegmann*, [1902] T.S. 40. Cf. M. Nathan, *Common Law of South Africa* (1907), Vol. IV, at pp. 2083 ff.; *idem*, *South African Insolvency Law* (4th ed. 1936), at pp. 438 ff.

[39] On 'mobilia sequuntur personam', see M. Wolff, *Private International Law*. (1945), s. 488.

[40] Joh. Voet, *Ad Pandectas* (1698), l. 20, t. 4, s. 12 (in Berwick's translation, 1902, at p. 395), merely stresses the great inconveniences resulting from concurrent administrations and mentions that within the Dutch States a single bankruptcy jurisdiction was secured by statutory provision and inter-provincial compacts. Cf. also l. 42, t. 7, s. 2; l. 1, t. 4, pt. 2, s. 11, 12. Paul Voet, *De statutis eorumque concursu* (1661), l. 9, t. 2, s. 18.

creditor was a prerequisite. It thus appears that the rule of *Solomons* v. *Ross* is not as rigid as could be deducted from the account in Henry Blackstone's *Reports*.

Does this affect the foundation of the doctrine stating that 'an assignment of a bankrupt's property to the representative of his creditors under the bankruptcy law of any foreign country to whose jurisdiction he is properly subject, is or operates as an assignment of the movables situate in England'? [41] It would, unless it is said that the question of equal treatment abroad for the English creditor [42] can always be considered under the concept of public policy.

Application of the doctrine as stated involves other difficulties. Bankruptcy does not operate everywhere as an assignment of the bankrupt's property to the trustee. Whilst such is the case under English [43] and American [44] law, in most of the civil law countries the property remains vested in the debtor, and only the exclusive right to administer it passes to the trustee.[45] This would limit the applicability of the doctrine, if taken literally, for a mere technicality.

All bankruptcy laws provide for a relation back of the effects of the bankruptcy to a time prior to the date of the adjudication. While the range of the relation greatly varies,[46] the principle itself is an integral part of bankruptcy law. In *Gailbraith* v. *Grimshaw*,[47] where the assets had been attached by a local creditor shortly before bankruptcy was declared abroad, the House of Lords has, however, refused to recognise the relation back of the assignment under the foreign law.

When bankruptcy has been declared abroad, and according to the foreign law the bankrupt's property has passed to the trustee, it would seem that the trustee, under the doctrine as

41 Dicey (and Keith), *Conflict of Laws* (5th ed. 1932), r. 124, at p. 498.

42 In *Dulaney* v. *Merry*, [1901] 1 K.B. 536, 539, 540, the question of equality was raised on the basis of the statute of Elizabeth in a matter concerning the effects of a deed of assignment for the benefit of creditors executed abroad.

43 Bankruptcy Act, 1914, s. 18 (1).

44 Bankruptcy Act of 1898, as amended, s. 70 (*a*), 11 U.S.C.A. s. 110 (Supplement 1944). All property passes no matter where it is situated. *Collier on Bankruptcy* (14th ed. 1942), Vol. IV, s. 70.07. *Williams* v. *Rice* (Man.K.B.), [1926] 3 D.L.R. 225. The bankrupt has the duty to 'execute and deliver to his trustee transfers of all his property in foreign countries'. Bankruptcy Act, s. 7 (*a*) (5), 11 U.S.C.A. s. 25 (Supplement 1944). *Collier on Bankruptcy*, Vol. I, s. 7.06.

45 W. Burge, *Commentaries on Colonial and Foreign Law*, Vol. III (1838), at p. 904; M. Wolff, *op. cit., supra*, s. 531; Amos and Walton, *Introduction to French Law* (1935), at p. 362.

46 *E.g.*, to the act of bankruptcy, in English law; to the date of the filing of the petition, in American and Canadian law; to the date from which the debtor ceased to meet his liabilities, in French law.

47 [1910] A.C. 508, *supra*, note 31.

stated, could claim the movables in England even if bankruptcy is subsequently declared in England.[48] It has long been held [49] that the Courts retain the right to adjudge a debtor bankrupt who has already been declared bankrupt abroad. The Courts have exercised the right at their discretion as seemed most advisable in the interest of the creditors.[50] Doubts have been expressed that the foreign trustee has a superior right even if he has been appointed by the Court of the domicil of the debtor.[51]

Solomons v. *Ross* and *Jollet* v. *Deponthieu* are the only cases in which the local assets were attached and a foreign trustee was allowed to collect them. In the other instances where foreign trustees could collect assets [52] these assets were unattached. On the other hand, such permission was not limited to movable property. A foreign trustee in bankruptcy was granted authority to act as a receiver of immovable property situated in England, to sell it, and to deal with the proceeds as trustee in bankruptcy.[53]

The theory of unity of bankruptcy is doubtless no part of English law.[54] One may wonder whether the theory of universality is part of English law. This theory is not needed to explain *Solomons* v. *Ross* and *Jollet* v. *Deponthieu*. In cases where the English Courts can declare bankruptcy it is practically a matter of discretion whether a foreign trustee in bankruptcy can collect local assets. It could be said that the right of discretion is even more desirable when, because of lack of jurisdiction, bankruptcy cannot be declared in England.

The seeming rigidity of the rule of *Solomons* v. *Ross* and *Jollet* v. *Deponthieu* has had an important part in the refusal of the Courts in the United States in following these decisions.

[48] Cf. *Re Reilly, A Bankrupt*, [1942] I.R. 432, 456, *per* Murnaghan, J.

[49] *Ex p. McCulloch* (1880), 14 Ch.D.(C.A.) 716; *Re A Debtor*, [1929] 1 Ch.(C.A.) 362, 370.

[50] Cf. *Ex p. Robinson* (1883), 22 Ch.D.(C.A.) 816, where the debtor had no assets in England and the Court declined to make an adjudication.

[51] *Re Artola Hermanos* (1890), 24 Q.B.D.(C.A.) 640, 646, *per* Lord Coleridge. In that case a firm established in Paris by five brothers of Spanish origin had been declared bankrupt in France. Subsequently a receiving order was made in London where the firm had a branch. France was not shown to be the country of the domicil of the debtor. Cf. W. V. Ball in 30 *International Law Association Reports*: The Hague 1921, Vol. I, at pp. 394 ff., 400, on the subject of domicil and bankruptcy jurisdiction.

[52] *Alivon* v. *Furnival* (1834), 1 Cr.M.&R. 277; *Re Blithman* (1858), L.R. 2 Eq. 23; *Re Davidson* (1873), L.R. 15 Eq. 383; *Re Lawson's Trust*, [1896] 1 Ch. 175; *Re Anderson*, [1911] 1 K.B. 896; *Re Craig* (1916), 86 L.J.Ch. 62; *Re Burke*; *King* v. *Terry* (1919), 54 L.J. 430; *Bergerem* v. *March* (1921), 151 L.T. 264.

[53] *Re Kooperman*, [1928] B.&C.R. 49; [1928] W.N. 101.

[54] G. C. Cheshire, *op. cit.*, *supra*, at p. 473.

According to Story,[55] the objection to the ubiquity of the operation of the bankruptcy laws was based upon the ground that the ubiquity could be prejudicial to the just rights of the American citizen. As was stressed by the Courts,[56] local diligence furnished an effective means for securing admission in distributions abroad. Through it the creditors were spared the trouble and expense which proof of their claims in another, possibly distant, country may incur. It gave the local creditor the benefits of the ' race of diligence ' system.

There have been important developments since the establishment of the American doctrine 150 years ago. At that time, the United States had no bankruptcy law[57] and the local diligence led to a preference which could not be challenged. Under the present Federal Bankruptcy Act, location of assets within the United States is sufficient to give bankruptcy jurisdiction.[58] Attachment liens obtained during the four-month period preceding the filing of the bankruptcy petition are void under the Bankruptcy Act if at the time of the attachment the debtor was insolvent.[59] By means of a bankruptcy declaration in the United States the creditor who attaches after bankruptcy has been declared abroad may therefore lose his preference.

The argument that proof of the claim in a foreign, possibly distant, country may incur trouble and expense is losing much of its importance with shrinking distances. Proof abroad is always necessary when the distribution abroad promises a higher dividend than is attainable by relying on the local assets. Often proof abroad will be less troublesome than engaging in local proceedings which, eventually, may not dispense with the necessity to prove abroad.

The basic argument of the American doctrine, protection against possible disadvantages abroad, remains, however, as cogent as before. Some security device is indispensable. For example, there is no guarantee that the local creditor will be admitted in the bankruptcy abroad with the

[55] J. Story, *op. cit., supra*, s. 410.

[56] See *Blake* v. *Williams* (Mass. 1828), 6 Pick. 286, 313 ff.; *Milne* v. *Moreton* (Pa. 1814), 6 Binn. 353, 375; *Remsen* v. *Holmes* (N.Y. 1822), 20 John. 229, 263, 264.

[57] Before 1898, bankruptcy legislation was in force from 1800 to 1803, 1841 to 1843, 1867 to 1878. See C. Warren, *Bankruptcy in the United States History* (1935).

[58] Bankruptcy Act of 1898, as amended, s. 2 (*a*) (1), 11 U.S.C.A. s. 11 (Supplement 1944). *Collier on Bankruptcy* (14th ed. 1940), Vol. I, s. 2.15.

[59] Bankruptcy Act of 1898, as amended, s. 67 (*a*), 11 U.S.C.A. s. 107 (Supplement 1944). *Collier on Bankruptcy*, Vol. IV, s. 67.07.

same ranking as at home, should the local assets be released unconditionally to the foreign Court. The rules of priority in bankruptcy distributions differ in each country. Tax claims, even when long overdue, have a first priority in some countries.[60] Will the foreign Court admit this priority which may absorb the whole estate even on assets coming from abroad? A wage-earner may have, under the law of the country where he works, a priority for wages earned within four months before the bankruptcy. If, in the foreign country where bankruptcy is declared, the period is limited to three months, will he be allowed to receive there what he would have had in the case of the distribution of the local assets in his country? There is no guarantee [61] as to this, the general rule being that questions of priority are governed by the law of the forum.[62]

Even more important than the differences in the priority system is the fact that foreign and domestic creditors are not treated alike everywhere. Discrimination against creditors from abroad has not entirely disappeared.[63] There are rules, mainly in the law of some Latin-American countries, which in certain circumstances give local creditors a right of priority of payment over creditors from abroad. The Argentine law,[64] for example, provides that in the case of concurrent bankruptcies, *i.e.*, when bankruptcy is declared abroad and in Argentine, the creditors in Argentine must have received payment in full in the Argentine bankruptcy before creditors of the foreign bankruptcy can share in the distribution. This provision,[65] which dates back to 1859 and has been the subject of much criticism,[66]

[60] International Chamber of Commerce, Resolutions of the Xth Congress (1939), Resolution 17. *Annales de droit commercial français, étranger et international, 1939, Supplément No.* 3, at p. 3.

[61] In *Stabb, Preston & Prowse* (1821), 1 Newfoundland Reports 267, the Court protected claims with priority under the Newfoundland statute by attaching conditions to the delivery of the local assets to the English trustee in bankruptcy. Cf. also *Matter of People (Norske Lloyd Ins. Co.)* (1926), 242 N.Y. 148, 168, for attaching conditions.

[62] *Thurnburn* v. *Steward* (1871), L.R. 3 P.C. 478, 513. G. C. Cheshire, *op. cit., supra*, at p. 651. *Restatement, Conflict of Laws* (1934), s. 554.

[63] See K. H. Nadelmann, 'Foreign and Domestic Creditors in Bankruptcy Proceedings. Remnants of Discrimination?' in 91 *University of Pennsylvania Law Review* (1943), at pp. 601 ff.

[64] Bankruptcy Laws No. 11719 of 1933, s. 7 (previously s. 1382 of the Commercial Code: *Commercial Laws of the World*, Vol. I (1909), at p. 259).

[65] Previously in force in Prussia: Code of Civil Procedure of 1793, Pt. I, Title 50, s. 665. L. Levi, *Commercial Law of the World* (1852), Vol. II, at p. 357. Amended in 1798 in consequence of diplomatic difficulties. *Novum Corpus Constitutionum Prussico-Brandenburgensium*, 1798, at p. 1758.

[66] References in K. H. Nadelmann, *op. cit., supra*, note 62, at p. 613 (note 68), 67–72 Clunet (1945), at p. 71 (note 45).

is in force also in Uruguay [67] and Paraguay [68] and has only recently been introduced in Peru [69] too. In Brazil,[70] priority is given to the local creditors in the case of separate and distinct establishments, *i.e.*, when the debtor has one establishment abroad and one in Brazil. Mexico has introduced a provision in its new bankruptcy law [71] granting priority on the assets in Mexico to creditors of a Mexican branch of a company declared bankrupt abroad. These are some examples of local priority rules. Their existence constitutes a grave international problem.[72]

Assuming that there are no priority problems of any kind, and that the creditor risks no loss of rights if the local assets are turned over to the foreign country, there is still the question whether, in the particular case, one administration is preferable to several from the practical viewpoint. Generally, the answer will be in favour of a single administration.[73] Still, circumstances can arise where several administrations are more advantageous, for example, when the debtor has separate establishments in different countries. It pertains to the Court which has the actual control over the assets to also judge this question of expediency.

In the United States, as elsewhere, the view has gained increasing support that concurrent administrations should be avoided whenever possible.[74] The trend toward a single administration is noticeable particularly in the administration of decedent estates. Though the conception prevails that the representative named in one State of the Union can act as such only within the limits of that State,[75] numerous exceptions have been created by the Legislatures and the Courts.[76] The Restatement of the law of the Conflict of Laws by the American Law

67 Commercial Code, s. 1577.
68 Commercial Code, s. 1383.
69 Bankruptcy Law No. 7566 of 1932, s. 26.
70 Bankruptcy Law No. 5746 of 1929, s. 161 (English edition by the British Chamber of Commerce in Brazil). Cf. *Ex p. Wilson* (1872), L.R. 7 Ch. 490.
71 Bankruptcy Act of December 31, 1942, s. 13 (3). See K. H. Nadelmann, 'Once More : Local Priorities in Bankruptcy', in 38 *American Journal of International Law* (1944), at p. 470.
72 The subject of 'Local Priorities' may well warrant action by the Economic and Social Council of 'The United Nations', under s. 62 of the Charter.
73 Cf. J. Westlake, 'On the International Aspects of Bankrupt Laws', in *Transactions of the National Association for the Promotion of Social Science* : Dublin Conference 1861, at pp. 777 ff.
74 See discussion in H. F. Goodrich, *Handbook on the Conflict of Laws* (2nd ed. 1938), at p. 514.
75 *Restatement, Conflict of Laws* (1934), s. 507.
76 See Goodrich, *op. cit., supra*, at p. 476; B. E. Hopkins, 'Conflict of Laws in Administration of Decedents' Intangibles' in 28 *Iowa Law Review* (1943), at pp. 42 ff., 613 ff.

Institute has sought to emphasise the unity of the estate as a whole, especially when the estate is insolvent.[77] A Uniform Powers of Foreign Representatives Act, drafted in 1944 by the National Conference of Commissioners on Uniform State Laws, gives foreign representatives wide powers.[78] In one particular instance, that of the statutory successor of a corporation, it has been held by the Courts[79] that the statutory successor prevails over local creditors and receivers, a rule which, however, does not preclude that a State may take measures to protect local creditors against possible discrimination abroad.[80] It has been argued[81] that the treatment of statutory successors by the Courts affords an analogy for similar treatment of foreign executors and receivers, that the arguments for recognition of statutory successors apply with much force to these other liquidators, and that the cases do not offer any insuperable objection to that conclusion.

It remains to be seen whether in matters of bankruptcy the Courts in the United States will see their way free to sustain a foreign trustee rather than uphold attachments of local creditors where no local protection is necessary and a second bankruptcy administration would not be in the interest of the local creditors. The cases[82] do not seem to bar the exercise of a discretion, nor does the passage in Story exclude it: 'Besides, national comity requires us to give effect to such assignments only so far as may be done without impairing the remedies, or lessening the securities which our laws provided for our own citizens'.[83]

Flexibility in the rules appears to be indispensable in international bankruptcy. The situations which arise are so varied that any one rigid rule cannot solve all of them satisfactorily. This is as applicable to a rule supporting the foreign trustee in bankruptcy as one favouring local creditors. It makes quite a difference whether the creditor would have to submit to bankruptcy proceedings in a neighbouring country with a similar bankruptcy law, or to proceedings in a remote country

77 *Restatement, Conflict of Laws* (1934), *e.g.*, ss. 501–503 (decedents' estates), 545, 553, 558–560 (receiverships).
78 Handbook 1944, National Conference of Commissioners on Uniform State Laws; 9 *Uniform Laws Annotated* (1945 Supplement).
79 See cases cited by Justice Cardozo in *Clark* v. *Williard* (1934), 292 U.S. 112. Cf. G. Glenn, *Liquidation* (1935), at pp. 410, 854.
80 *Clark* v. *Williard* (1935), 294 U.S. 211, 214, 215.
81 E. E. Cheatham, 'The Statutory Successor, the Receiver and the Executor in Conflict of Laws' in 44 *Columbia Law Review* (1944), at pp. 549 ff.
82 *Supra*, notes 5 and 37.
83 *Op. cit.*, *supra*, s. 414.

which might have a different legal system and dissimilar priority rules. Neither the theory of territoriality nor the theory of ubiquity can cope adequately with the divergent situations.

The same has been experienced in the bankruptcy treaty field. All efforts have failed to find a type of treaty suitable for universal application.[84] On the other hand, when two specific countries have tried to find a basis for an arrangement on bankruptcy, such attempts have been successful. More than a score of bi- or multi-lateral treaties have been concluded, most of them between neighbouring States, providing for a single bankruptcy administration under specified rules.[85]

Progress in the treaty field is bound to be slow, and the problems arising in the absence of agreements will bear continued attention. *Solomons* v. *Ross*, expressing the liberal, co-operative attitude without sacrificing anything worthy of protection, will hold its eminent place in the evolution of international bankruptcy law. The note on the case in Wallis' *Reports* concludes: 'And this decree was in every particular complied with, without any complaint of any injustice or illegality in it'.[86] Indeed, from the viewpoint of equity, equality being equity, the creditor Ross had no cause for complaint.

K. H. NADELMANN.

[84] Cf. statement of the British Delegation to the Fifth Conference on Private International Law, The Hague, 1925, *Actes de la 5e Conférence de Droit International Privé de La Haye* (1925), at p. 46; reproduced in K. H. Nadelmann, 'Bankruptcy Treaties', in 93 *University of Pennsylvania Law Review* (1944), 58 ff., at p. 85. Report of the Insolvency Committee, Dr. Burgin, chairman, 37 *International Law Association Reports*: Oxford, 1932, at p. 288.

[85] The more recent treaties, *e.g.*, the Franco-Italian treaty of 1930 and the Scandinavian Bankruptcy Convention of 1933, contain choice of law rules and determine, *e.g.*, what law is to govern priorities and preferences. See K. H. Nadelmann, *op. cit.*, *supra*, note 84.

[86] Wallis-Lyne, *Irish Chancery Reports*, 61, note.

STATUTES

THE present Parliament is passing legislation faster than we can comment on it and of the very considerable number of new Acts that have found their way to the statute-book, space only permits consideration of the following:—

FURNISHED HOUSES (RENT CONTROL) ACT, 1946

THIS Act is designed to stop the racket in furnished lettings to which, of course, the Rent Acts do not apply. Its passing was timely, particularly in view of the much-publicised judgment of Henn Collins J., in *Property Holding Co., Ltd.* v. *Mischeff*, [1946] 1 All E.R. 406, in which he held that the value of certain fitted furniture had to be assessed on present-day prices (why? Surely it should be assessed on the basis of prices prevailing at the commencement of the lease which might well be considerably less?), and that if £30 out of a rent of £202 is attributable to such furniture this constitutes 'a substantial portion' of the rent so as to take the letting outside the protection of the Rent Acts. As a result of this decision the landlords of many blocks of flats found that tenancies that they had thought to be controlled were not controlled at all, and considered an immediate increase in rents—an action from which they were only deterred by the speedy passing of this Act through its remaining stages and by the suggestion of the Minister of Health to local authorities that they should consider exercising his powers of requisitioning.

The main points of the Act are:—

1. It only applies to a district when extended to it by the Minister of Health on representation by, or after consultation with, the local authorities. It is believed that most local authorities in London have already represented that it should be extended to them.

2. When extended to a district a local tribunal (chairman and two members) is set up.

3. Either party (or the local authority) to any letting at a rent which includes payment for the use of furniture or for services may apply to the tribunal which may either approve the contractual rental, or reduce it to such sum as they consider reasonable, or dismiss the application. Approval

may be either for an indefinite or fixed period. They may not increase the rent except in one case, namely, when the rent includes payment for services and the tribunal considers that an increase is proper having regard to the increase since September 3, 1939, in the cost of such services. It should be noted that there is no requirement, similar to that in the Rent Acts, that payment in respect of furniture or services must constitute a substantial portion of the rent, and that 'services' includes the provision of heating, lighting and hot water (*secus* under the Rent Acts, see *Engvall* v. *Ideal Flats*, [1945] 1 All E.R. 230, and *Property Holding Co., Ltd.* v. *Mischeff*, *supra*).

4. If a rent is approved or fixed by the tribunal, it is entered in a public register to be kept by the local authority, and it is then illegal for the landlord to charge more or to levy a fine or premium, *i.e.*, the rent is fixed not only as between the parties but for the purposes of any future letting to which the Act applies. It would appear that on a strict interpretation of this provision a landlord who wishes to relet with increased services or furniture must apply to the tribunal before he can increase the rent.

Any excess rent or any fine or premium paid is recoverable, and the landlord also incurs heavy penalties if proceedings are instituted by the local authority.

5. The landlord, tenant, or local authority may subsequently apply again to the tribunal on the ground that the circumstances have changed, and on such an application the tribunal may also increase the rent (in theory it would seem that they may even increase it to more than the original contractual rent, whether or not it includes payment for services).

6. When a letting has been referred to the tribunal by the tenant or the local authority, notice to quit may not be served by the landlord while the application is pending, or within three months thereafter, unless the tribunal directs that a shorter period shall be substituted for three months.

7. It should be noted that the Act is in some respects more, and in others less, extensive than the Rent Acts. It is more extensive in that it applies irrespective of the rateable value of the house. It is less extensive in that it only applies to the particular districts to which it may be extended, and because it merely enables rents to be controlled but, except to the limited extent referred to in 6 above, does

not afford the tenant security of tenure. If, therefore, the landlord wishes to vent his spleen on the tenants by giving them all notice so soon as the three months have elapsed, the only remedy of the tenants is to persuade the local authority and the Minister to requisition or to hit back at the landlord by applying again to the tribunal and persuading them to show their opinion of the landlord's conduct by reducing the rent still further.

Moreover, the rent is controlled flexibly under the new Act; all depends on what the tribunal consider reasonable and not on an inflexible 'standard rent'.

8. Nor is it true to say that even in the districts to which the Act applies every tenancy is either controlled under the Act or under the Rent Acts. Apart from the obvious exception of unfurnished lettings of houses above the prescribed rateable values, neither control applies to lettings which include payment for board, provided the value of the board forms a substantial proportion of the whole rent. Moreover, neither will protect a tenant on an unfurnished letting who has sub-let the whole house furnished. This exception may have unfortunate and probably unintended consequences, for the sub-tenant may apply to the tribunal to fix the rent under the furnished sub-letting, although the tenant will have no means of controlling the rent which he has to pay the landlord. In such a case the tribunal may be faced with the alternatives of causing hardship to the tenant by fixing the rent to be charged by him, or of causing hardship to the sub-tenant by refusing to do so.

9. Further, a letting may be controlled both under the Act and under the Rent Acts. As indicated above, this would occur where the rent includes payment for furniture or services but where the payment does not constitute a substantial portion of the total rent, or where the services do not constitute attendance within the meaning of the Rent Acts. Normally, a tenant protected by the Rent Acts will not require the additional protection of the Act, but there might be circumstances in which he could persuade the tribunal to reduce the rent below the standard rent, and in such a case he could apparently stay on at the reduced rent without being liable to be ejected at the end of the three months except in the limited circumstances permitted under the Rent Acts.

It may be apparent from the above that the Act shows

signs of haste both in design and draughtsmanship. While it undoubtedly meets a need, it leaves the law of landlord and tenant even more untidy than before, for we now have one system applying to 'unfurnished' lettings and an entirely different system for 'furnished' lettings. It is to be hoped that the whole subject will soon be taken in hand.

L. C. B. G.

CONTROLS DURING THE TRANSITION PERIOD

Supplies and Services (Transitional Powers) Act, 1945
Emergency Laws (Transitional Provisions) Act, 1946

IT had for long been evident that when in due course the War came to an end the vast body of controls which the Government exercised under emergency powers during the hostilities would have to be carefully reconsidered. Only persons totally lacking in foresight or understanding thought it would be possible to remove all or most of the wartime restrictions at one stroke without precipitating the gravest economic, social and political dangers. The deplorable consequences which have resulted in the United States from such a policy are a clear indication of what would have occurred in the United Kingdom if a similar misguided attitude had been adopted by the British Parliament and Government.

On VE day (May 8, 1945) there were 687 emergency regulations in force: 342 Defence (General) Regulations and 345 others. The next day 84 of the former and 95 of the latter were withdrawn. On May 28, the day when the Coalition Government resigned, one more Defence Regulation was withdrawn. On September 28, a further batch of 39 Defence (General) Regulations and eleven others were revoked. Thus, 230 emergency regulations, or more than a third of the total number, have been withdrawn. Since VE day one new Defence (General) Regulation and two others have been made. The remaining regulations numbered 460, of which 219 were Defence (General) Regulations and 241 other categories.

The Emergency Powers (Defence) Acts, under which the regulations were made, expired on February 24, 1946. Those Acts have been succeeded by two statutes entitled the Supplies and Services (Transitional Powers) Act, 1945, and the Emergency Laws (Transitional Provisions) Act, 1946. The former is by far the more important. It differs in only two important respects from a similar measure which was

introduced by the Coalition Government on May 10, 1945, but dropped by the Caretaker Government. The Coalition Bill was to last for two years only whereas the present Act will endure for five years. The other difference will be mentioned later.

The gist of the Supplies and Services Act is that it enables certain Defence Regulations to be continued in force by Order in Council if it appears to His Majesty to be necessary or expedient to do so in order to secure the fulfilment of specified purposes. These purposes are declared by section 1 (1) to be those of so maintaining, controlling and regulating supplies and services as to achieve one of the following objects:—

(a) to secure a sufficiency of those supplies and services which are essential to the well-being of the community or their equitable distribution or their availability at fair prices; or

(b) to facilitate the demobilisation and resettlement of persons and to secure the orderly disposal of surplus material; or

(c) to facilitate the readjustment of industry and commerce to the requirements of the community in time of peace; or

(d) to assist the relief of suffering and the restoration and distribution of essential supplies and services in any part of His Majesty's dominions or in foreign countries that are in grave distress as the result of war.

Item (b) is obviously the simplest and (as a critic would say) the most 'harmless' of the four objects. It is confined to assisting men and women coming out of the Forces and liquidating the vast accumulation of stores acquired by the Government during the war. Item (c) aims at reconverting industry and commerce from military to civil needs; but 'the requirements of the community in time of peace' is a matter on which widely differing views are held. Indeed, the last General Election was a prolonged debate on this very question. The Act gives no indication of what the nation's peacetime requirements are or are deemed to be, nor is there any attempt to relate the expression to pre-War conceptions, standards or practices. The Government is thus at liberty within wide limits to interpret the phrase in accordance with their own political philosophy.

Item (a) offers even greater opportunities to Ministers to exercise the permitted controls to attain ends which formed

no part of national policy before the war. If for example, the Government desires to achieve what the Webbs called 'planned production for community consumption', it would not be difficult to argue that this is authorised by objective (a).

Item (d) brings us again to less controversial ground, since it is clearly intended to enable the Government to render first aid to the countries which are suffering severely from the effects of the war.

The purposes for which Defence Regulations could be made were much wider, for they included public safety, the defence of the realm, the maintenance of public order, the efficient prosecution of the war and the maintenance of supplies and services essential to the life of the community. But whereas the Emergency Powers (Defence) Acts spoke only of the *maintenance* of supplies and services, the new Act refers to *maintenance, control and regulation.* Furthermore, while the wartime legislation was confined to the provision of supplies and services essential to the life of the community, the present Act extends to those which are essential to the well-being of the nation as well as to various other purposes. Many comforts, luxuries and amenities are necessary for well-being but are not essential to life. Hence, while the new Act is far less comprehensive than the Emergency Powers Acts, it is much wider in scope so far as supplies and services are concerned.

The Supplies and Services Act applies only to Defence Regulations in Parts III or IV of the Defence (General) Regulations in force at the date when the Act was passed (December 10, 1945), together with certain other Defence Regulations set out in the First Schedule to the Act. Thus, with one exception, the Act does not confer power to make fresh regulations: it merely enables any of the existing Regulations in Parts III and IV to be applied to the new statutory purposes of the reconstruction period and amendments to be made in any regulation so applied. The exception is in regard to price control, for in this matter the Government could make new regulations until the expiry of the Emergency Powers (Defence) Acts on February 24, 1946, in order to prevent excessively high prices being charged; and such regulations could then be continued under the new Act. It was in this respect that the present Act differs from the Bill introduced by the Coalition Government.

The Home Secretary, in introducing the present measure, said that the economic case for retaining controls rested on

four main arguments: First, the need to restrict or ration clothing, footwear, textiles, furniture, fuel and other commodities in short supply, so as to secure fair distribution. Second, the need to regulate the building industry, so as to prevent prices rocketing and essential structures, such as houses, schools, factories and hospitals, being neglected in favour of luxury building. Third, the need to maintain agricultural production at the highest possible level. (This involves the use of about a dozen Defence Regulations. For example, to ensure that agricultural land is not used for other purposes without the Minister's permission; the suspension of restrictions on the keeping of hens, rabbits and pigs; the destruction of game and pests; the conferring of power on local authorities to cultivate land and to let it for allotments.) Fourth, the need to avoid inflation through the application of the more effective and comprehensive system of price control which the Act authorises.

With this in mind we can glance at the Defence (General) Regulations to which the Act applies. Part III deals with ships and aircraft. These regulations cover a wide variety of subjects, such as the general control of navigation; the engagement and discharge of merchant crews; control of trade by sea; desertion from fishing boats; power to require performance of services in ships; the regulation of agreements for the use or hire of, or carriage of goods in, ships, and similar matters.

Part IV of the Defence (General) Regulations relates to essential supplies and work. It is by far the longest part of any. The regulations which it contains are very numerous, detailed and long. The competent authorities to which they refer comprise the great majority of Government Departments.

It is impossible in a short article to depict the range and extent of these Part IV Regulations. They authorise a competent authority to take possession of land and to use it for any of the authorised purposes, including the working of any minerals; to requisition property other than land (including any ship or aircraft); to require accommodation in a ship or aircraft to be placed at the Government's disposal; to take control of any war production undertaking either individually or as a class; to exercise general control of industry, by which is meant regulating or prohibiting the production, treatment, keeping, storage, movement, transport, distributing, acquisition, use or consumption of articles of any description, and for controlling their selling prices and the charges which

may be made for the hire of such articles. Defence Regulation 55, which contains these powers, is perhaps the most important of all the regulations from the standpoint of controlling the national economy. Part IV Regulations include those relating to the location of industry, liquor licensing, restrictions on the sale of raw milk, public utility undertakings, the control of building operations, and civil engineering works, the control of employment, the avoidance of strikes and lock-outs, and other matters of large importance. They also deal with miscellaneous details such as the certification of electricity meters, provisions for stamping cheques, the modification of medical prescriptions, and the destruction of valueless documents. In addition to these so-called general provisions, there are other Defence Regulations in Part IV classified under Agriculture and Fisheries, Housing, Transport, and Import, Export and Customs powers.

Although Part IV is entitled *Essential Supplies and Work*, the regulations it contains are not by any means confined to those directed to the maintenance of supplies and services essential to the life of the community. Many of them—including the most important ones—were designed also to secure the public safety, the defence of the realm or the efficient prosecution of the war and are expressed in those terms. It is, however, important to note that a Defence Regulation under Part IV which was passed solely in order to speed war production or otherwise to assist the war effort can be continued under the new Act if it furthers the purposes laid down by that statute. Moreover, section 3 of the Supplies and Services (Transitional Powers) Act, 1945, empowers His Majesty by Order in Council to vary any of the Defence Regulations to which the Act applies in such manner as appears to him to be necessary or expedient for any of the purposes of the new Act.

The Defence (General) Regulations which are excluded from being continued under the new Act are those under Part I, which provide for the security of the State; and those coming under Part II, which relate to public safety and order. On the other hand, the First Schedule to the 1945 Act brings within the ambit of the new system all the regulations in force on December 10, 1945, comprised in the special groups of Defence Regulations relating to Bodies Corporate and Trade Unions; to the Encouragement of Exports; to Finance; to Local Government in Scotland; and to the Recovery of Fines

The Defence (General) Regulations in Part V, which deal with general and supplementary matters, such as administration, offences and legal proceedings, are brought within the scope of the 1945 Act only in so far as they apply to any other regulations having effect by virtue of the Act.

It can be seen that the Supplies and Services (Transitional Powers) Act, 1945, is of great importance and interest not only because it makes provision for the transition from war to peace but also because it confers powers of a kind which are necessary, at least in reserve, during a partial transformation of the national economy such as that which the Government is intent on achieving. Furthermore, the powers of the Ministry of Supply are enlarged so as to enable it to buy, manufacture, acquire or otherwise produce, and also to exchange, sell or otherwise dispose of any articles required for the public service, which is now defined to include any of the purposes set out in section 1 of the Act.

I come now to the Emergency Laws (Temporary Provisions) Act, 1946. Its principal purpose is to prolong the life of certain Defence Regulations until the end of 1947 (unless they are withdrawn before then or continued thereafter by an Expiring Laws Continuance Bill). The regulations in question are enumerated in the First Schedule to the Act, subject to a number of exceptions, modifications and limitations there specified. The Schedule contains fifty-one Defence (General) Regulations or parts of them; and also the less important provisions from twenty-eight of the other codes of Defence Regulations. As in the case of the Supplies and Services Act, the statute does not make or authorise the making of new regulations, but only continues some of those which were previously made.

The Act also prolongs the life of certain statutes, such as the Rent of Furnished Houses Control (Scotland) Act, the Sugar Industry Act, 1942, and several others. Further, it makes permanent some amendments to the law which had been effected by Defence Regulations on a temporary basis. Lastly, it repeals three statutes in whole or part.

It was pointed out by Mr. Oliver, the Under Secretary for the Home Office, in the Second Reading debate, that many of the regulations continued by the Act are extensions of liberty rather than a curtailment of it. For instance, Defence Regulation 33 extends from three to twelve months the time within which a birth may be registered, if the parent has moved from

the district owing to the war. Under another regulation, a liquidator called up for military service may delegate his powers to a deputy; and so on. But no doubt Dr. Allen and his school do not wish to have their liberties extended by executive decree. For in the first place, they object to the method; and in the second, it would spoil their argument, into which so much emotion has been injected, that administrative action leads invariably to tyranny.

The powers conferred by these two Acts are very extensive; larger, indeed, than those which have been possessed by any Government in this country in modern times for peaceful purposes. Very extensive use is being made of them, as anyone can see who takes the trouble to look at the vast number of Orders which have already been issued under the Supplies and Services Act. But is this in the least surprising? The country has just emerged from the most severe, dangerous and totalitarian war in its history; it confronts a critically serious domestic and world economic situation; and it has elected a Parliament pledged to far-reaching economic and social changes in the direction of a planned economy and the socialisation of several basic industries. Any one of these factors would justify very substantial emergency powers being conferred on the executive. In conjunction, they make an overwhelming case, on one assumption. That assumption is that the Government will carry out the kind of policy which it is pledged to undertake: that is, a planned conversion from military to civil activities; a planned reconstruction programme; a planned attainment of full employment. Dr. Allen dislikes the policy, but it is the method which he attacks. It is obviously utterly impracticable for Parliament to legislate in detail on all the multitude of matters which are covered by these and other regulations. Even as it is, the House of Commons can scarcely get through its present work. Is it seriously suggested that we should return to the practice of the eighteenth century, when Parliament legislated in detail on practically every individual topic of administrative action?

Of course there are grave dangers inherent in the modern development of delegated legislation. The task of public lawyers is, however, to devise effective safeguards rather than to cry 'Woe, woe!' or to demand the abandonment of an essential instrument of Government.

W. A. ROBSON.

NOTES OF CASES

LIBELLOUS COMMUNICATIONS BY A FOREIGN STATE OFFICIAL

FROM the point of view of international law the decision of Henn Collins J. in *Szalatny-Stacho* v. *Fink*, [1946] 1 All E.R. 303 is both interesting and puzzling.

The defendant, the Chief Military Prosecutor in the Czech Army, published documents alleged to be defamatory upon the plaintiff, the then Czech Envoy in Cairo, by sending them to the Military Office of the President of the Czechoslovakian Republic in London. The principal point for decision was whether the communication was entitled to absolute privilege. The learned Judge held that by English law no such privilege could be claimed. On the other hand he found that by Czech law 'this communication could not have founded any action, civil or criminal', though in view of an admitted excess of the defendant's official duty the plaintiff apparently had by Czech law the remedy 'to call in question the excess by some other form of procedure' (which he did without success).

If the libel had been published in Czechoslovakia, no action could have been maintained here, because the communication, though actionable in England, would have been justifiable under the *lex loci delicti*. (This, at any rate, seems to have been the conclusion of the learned Judge, though his reference to the existence of 'some other form of procedure' does not make it quite certain whether by Czech law it was not perhaps actionability only that was excluded while there remained such lack of justifiability as to bring the case within the rule in *Machado* v. *Fontes*, [1897] 2 Q.B. 231.) But the tort was committed in England. At first sight, therefore, English law alone applied, whatever the nationality of the parties, and Czech law was immaterial. How, then, was it possible for the defendant to invoke the protection which Czech law would give him?

Henn Collins J. held that it was the comity of nations, *i.e.* public policy that demanded that 'His Majesty's Courts should extend to communications such as this, passing between Czech nationals on Czech affairs, the same protection as their own domestic courts would afford. . . . If the comity of nations is ever to be applied, it should surely be applied

where the document in question was published in this country only because the foreign Government, being our allies, were our guests while their unhappy country was occupied by our common enemy '.

This is, therefore, a second case where an English Court invokes public policy not to exclude the application of a foreign law, but to allow foreign law to impose itself to the exclusion of English law which would normally be applicable. The first case was *Lorenzen* v. *Lyddon & Co.*, [1942] 2 K.B. 202, on which see 5 (1942), MOD.L.REV. 262, and which has been described as introducing ' an entirely new and rather dangerous conception of public policy ' (M. Wolff, *Private International Law*, p. 537).

Henn Collins J. derived support for his decision from the opinion of the Privy Council in *Hart* v. *Grumbach* (1873), L.R. 4 P.C. 439, 465. That was a case where the defendant, a British subject employed by the Emperor of China, had made to the Board of Ministers for Foreign Affairs at Peking a report which, it was alleged, contained a libel upon the plaintiff, also a British subject. Under the Treaty of Tientsin the action came before Her Majesty's Supreme Court for China and Japan and was to be decided according to English law. It was in these circumstances that the Board to whom the defendant appealed said :—

> Considerations of public policy, if at all, arise in this case upon the suggestion that it is contrary to the comity of nations and therefore against the public interests of this country, to entertain a suit involving an inquiry into reports made by an officer in the service of a foreign State to the Government of that State. Their Lordships are not prepared to say that cases may not occur in which effect should not be given to these considerations. If it were shown that by the law and customs of China officers in the service of the Government were absolutely protected in making reports concerning their subordinates, and that it was against the policy of the Emperor to allow them to be questioned by any Court, it might be proper to hold that it would be contrary to the comity of nations, and therefore our own public policy, having regard to this comity, to allow a subject of the Queen . . . to maintain such an action as the present. But this is not shown.

This case is distinguishable on the ground that the tort was committed in China. Although the Privy Council speaks

of public policy, all that it was necessary to re-affirm was the principle that in respect of an act committed abroad an action for tort lies in this country only if the act is unjustifiable under the *lex loci delicti*. The suggestions made by the Privy Council should be understood in this narrow sense. They are not conclusive in regard to the present case in which the tort was committed in England.

Yet the result reached by Henn Collins J. merits approval. It is merely the reasoning of the learned Judge that raises a doubt, not only because the doctrine of public policy (even if it should be allowed to lead to the application rather than the exclusion of foreign law) should be resorted to most sparingly, but also because it is not easy to define the precise limits of the decision. Henn Collins J. based it on three, and perhaps four, circumstances, *viz.*, the nationality of the parties, the fact of the communication relating to Czech affairs, and the fact that the addressee was a dispossessed Government temporarily established in London. It is not quite certain to what extent he was also influenced by the fact (mentioned in another connexion) that the defendant was 'a State official and acting as such'. What is the decisive element? Nationality and subject-matter would appear to be irrelevant; if a British subject in the employ of the Czech Government had reported about the activities of a British Envoy, he ought to have been allowed the same measure of protection as the defendant; on the other hand a complaint made by Czech civilian refugee to the Czech Government in London about another Czech refugee does not deserve protection.

Many international lawyers would probably justify the decision on the ground that the defendant's act was an Act of State and as such entitled to immunity *ratione materiæ*. But for reasons which have been developed at length in 59 (1943) L.Q.R. 53 *sqq.* this line of approach would be too sweeping to be reconcilable with sound legal doctrine.

The safest ground of decision would appear to be that the communication was made by a Czech official, acting in pursuance of his duties, to his Government which with the consent of His Majesty was established and exercising its functions in London. The consent of His Majesty to a foreign Government exercising its sovereignty in England implies that in all matters of internal administration the foreign Government functions and lives under its own laws: see *Re Amand* (*No.* 2), [1942] 1 All E.R. 286. If, *e.g.*, the

Czech Parliament is allowed to sit in London, it would be inconsistent with such permission to hold that the Speaker who causes a member to be ejected commits trespass under English law. Similarly the defendant kept within the sphere of internal governmental business conducted under the sovereignty and law of Czechoslovakia; the very nature of the assent given by His Majesty to the establishment of the Czech Government in London is such as impliedly to limit the ambit of British law and the power of Great Britain to interfere with what in *McCullock* v. *Maryland* (1819), 4 Wheat. 216 Chief Justice Marshall called the instrumentalities of Government, *i.e.*, those agencies through which a Government immediately and directly exercises its sovereign powers (see the definition in *Metcalf* v. *Mitchell* (1925), 269 U.S. 514).[1, 2]

F. A. MANN.

NULLITY—NON-CONSUMMATION OF MARRIAGE—BIRTH CONTROL

Cowen v. *Cowen*, [1946] P. 36 is a decision of the Court of Appeal of considerable social importance. It decides that if in intercourse throughout the marriage the husband has used contraceptives the marriage has not been consummated. Hence if the wife has not agreed to this practice (except for adequate reasons) she can obtain a decree of nullity, under the Matrimonial Causes Act, 1937, s. 7 (1) (*a*) (i), on the ground that the husband has wilfully refused to consummate the marriage. The Court held that consummation denotes complete sexual intercourse and not, as Pilcher J. had thought, mere penetration. Whether the position would have been the same if the woman had been the one to use contraceptives was not discussed, and some of the words used in considering the nature of complete intercourse make it possible to argue that it would not. On the whole, however, it seems clear that the basis of the decision is that a marriage is not consummated until intercourse has taken place which is

[1] Dr. Kahn-Freund has been good enough to draw the writer's attention to this analogy derived from a constitutional system in which two sovereignties co-exist.

[2] While this note was going through the press, the Court of Appeal affirmed the decision of Henn Collins J. on the ground that the communication was entitled to qualified privilege. At the same time the Court of Appeal disapproved of the reasoning of the learned Judge. The point which, it is submitted, supports the decision of the Court of first instance was not argued before or considered by the Court of Appeal.

capable of leading to the birth of a child. It may, therefore, be said with some confidence that it has now been decided that a marriage may be annulled if either husband or wife has throughout insisted on the use of contraceptives contrary to the wishes of the other spouse.

The decision is a timely reminder that from the point of view of the State the procreation of children remains the basic object of marriage. On the other hand matrimonial causes remain hostile litigation involving comparative innocence on one side and guilt on the other. Hence the decision makes it clear that the marriage cannot be annulled if the petitioner without good reason has acquiesced in the habitual use of contraceptives, despite the fact that from the point of view of the State there would seem to be just as powerful reasons for annulling the barren marriage in this case as in the other. But acquiescence for a limited period and for particular reasons may be justified and not preclude relief; in *Cowen* v. *Cowen* the parties agreed not to have children while they were residing in a tropical country with an inadequate medical service and it was held that this did not prevent the wife from succeeding after the conditions had changed and she wished to bear children. As to what reasons will be accepted as justifying acquiescence, the Court said that 'each case must be dealt with on its own facts in the light of established principle'. Presumably these reasons may be economic as well as geographical, so that an agreement to use contraceptives while their income was less than they reasonably regarded as needed if they were to rear children would not prevent annulment if the petitioner withdrew his or her agreement so soon as that income was attained. Possibly too an agreement not to have children during the War would be treated in the same way.

A further question may be posed. If the marriage cannot be annulled either because it has at some time been consummated by complete intercourse or because both parties have agreed to the use of contraceptives, what is the position if one party now wants a child and the other refuses? As the cases stand at present it seems clear that the mere refusal is not a matrimonial offence on which a claim for relief can be founded; it has been held that a complete denial of sexual intercourse is not desertion and if this is so an insistence on the use of contraceptives clearly cannot be (*Jackson* v. *Jackson*, [1924] P. 19). At the most it would be regarded as conduct conducing, or as preventing the insisting party

from establishing desertion without cause if the other party left him (*Synge* v. *Synge*, [1900] P. 180). But it is difficult to justify these cases in the light of the principle on which *Cowen* v. *Cowen* was decided; if the procreation of children is the basis of marriage it should be possible to dissolve the marriage if one party unreasonably refuses to permit the other to have children, and it would still be open to the Court of Appeal to hold that such conduct constitutes desertion.[1]

In view of the widespread practice of birth control the decision in *Cowen* v. *Cowen* is unquestionably of considerable importance and on social grounds it may be welcomed. On the other hand sufficient has been said to indicate that the present state of the law on this point is not free from anomalies, many of which inevitably flow from an attempt to treat matrimonial causes partly as the intervention of the State on grounds of public policy and partly as the punishment of the guilty party at the instance of the innocent. So far as it goes *Cowen* v. *Cowen* is an example of the victory of the first principle but the latter was not discarded and until it is our Family Law cannot be other than illogical and unsatisfactory.

L. C. B. G.

EXTRATERRITORIAL EFFECT OF STATUTES—RAISING NEW POINTS IN THE COURT OF APPEAL—TORT COMMITTED ABROAD

AN interesting but little noticed decision in 1945 was *Yorke* v. *British and Continental Steamship Co., Ltd.*, 77 Ll.L.R. 418 (Liverpool Ass.); 78 Ll.L.R. 181 (C. A.). The facts of the case were simple. When the defendants' steamship *Imber* was moored at Gibraltar, the plaintiff, who was then third officer on the ship, fell down an unfenced hatch and was hurt. He sued the defendants, basing his claim on common law negligence and on breach of the Dock Regulations of 1934, made under the Factory and Workshop Act, 1901. The defendants contended (1) that the Regulations did not apply, (2) that they had not been guilty of negligence, (3) that the plaintiff had been guilty of contributory negligence, and (4) that the doctrine of common employment applied. Stable J. held that Dock Regulation 37 applied and that the defendants had been guilty of a breach of it, that there was evidence of common law negligence, but that it was not

[1] The Court of Appeal have now refused so to hold and have confirmed the position as stated in the text (*Weatherley* v. *W.*, The Times, April 17). Scott L.J. dissented and leave was given to appeal to the House of Lords.

necessary to decide the point, and that there had been no contributory negligence on the part of the plaintiff. The defence of common employment was expressly abandoned by the defendants. Judgment was given for the plaintiff and the defendants appealed. The Court of Appeal held that the Dock Regulations did not apply, that the defendants had been guilty of common law negligence and, affirming Stable J., that there had been no contributory negligence. The appellants sought to raise the question of common employment which they had abandoned in the Court of first instance; this, however, was not admitted by the Court and the appeal was dismissed.

The case gives rise to several interesting points, first of all that of the applicability of the Dock Regulations outside the United Kingdom. Scott L.J. said in his judgment that the point had been considered in many cases, and he referred to *R.* v. *Jameson*, [1896] 2 Q.B. 425, *Tomalin* v. *Pearson*, [1909] 2 K.B. 61, and *Krzus* v. *Crow's Nest Pass Coal Co.*, [1912] A.C. 590. He pointed out that British legislation does not extend outside the territory or, at any rate, the territorial waters of the United Kingdom, unless Parliament has expressly said so. The legislation in question does not purport to apply outside the jurisdiction of British Courts and the Regulations made in respect of United Kingdom docks and harbours apply to ships only because they happen to be in these ports and harbours. Morton L.J. concurred, relying on a passage of Maxwell's *Interpretation of Statutes*, cited in *Tomalin's Case*. The gist of that passage is that in the absence of a clearly expressed intention or one to be inferred from its language, object, subject matter or history, it is to be presumed that a statute is not to operate outside the territorial limits of the United Kingdom.

The three cases cited have, it is submitted, little value as precedents for *Yorke's Case*. In *Jameson's Case*, the point to be decided was whether the Foreign Enlistment Act applied to a certain colony. Section 2 of the Act provides that it is to extend to all the King's dominions (it must be remembered that this was before the passing of the Statute of Westminster, 1931), and the *ratio decidendi* of that part of the case is simply that this express provision is sufficient to render the Act applicable to the territories indicated in it. *Tomalin's* and *Krzus' Cases* turned on the construction of the Workmen's Compensation Acts and

should, therefore, not be binding precedents for the construction of a different statute. The principle laid down in *Maxwell* appears, however, to be sound. Lord Russell C.J.'s *dictum* in *Jameson's Case* that subject to the limits of the British Parliament's power to legislate for a country at all, the area to which a statute is to apply must be gathered from its language and purview is to the same effect. If the Dock Regulations are tested by it, it becomes clear from the title of the Regulations ('Regulations in respect of the loading, etc., goods in or at any dock, etc., and the processes of loading, etc., any ship in any dock, etc.') that their object is to provide for the safety of operations in British ports and not to provide for what Stable J. termed the structure of the ship, apart from such operations.

The defendants, having pleaded common employment, abandoned that defence in the Court of first instance and then sought to raise it again in the Court of Appeal. It would appear from the report that the argument whether or not they were entitled to do so was conducted on the assumption that it was merely a point of law, and the question was naturally treated as analogous to that of raising a point that had not been mentioned before. Scott L.J. referred to the case of *Banbury* v. *Bank of Montreal*, [1918] A.C. 626, pointed out that the principle of that case did not apply and decided that the issue could not be raised. It will be observed that he refers to the point of common employment as an issue and not as a point of law, and indeed it involves both facts and law. The powers of the Court of Appeal in these and similar cases are set out in Order LVIII, r. 4, which provides that the Court of Appeal shall have full discretionary powers to receive further evidence as to questions of fact, but, except upon interlocutory applications and in cases where new matters have occurred after the decision appealed from, this should be done by leave and for special reasons only. With the exception of extreme cases where the discretion is properly exercised in order to prevent a miscarriage of justice, a clear principle seems to apply. It is this. The Court of Appeal or any appellate Court for that matter would normally (although it is always a matter of discretion) do what the Judge of first instance would have done if the matters presented first on appeal had been presented to him, but will not thus act on matters which could have been presented to the jury. In order to understand the suggested

principle one has to distinguish clearly between the functions of Judge and jury and bear in mind that the jury, once gathered, discharges its functions and then disperses for good. (Cf. Amos: 'A Day in Court at Home and Abroad' 2 *Cambridge Law Journal* 340.) The verdict and the matters on which it is based should, therefore, if at all possible, not be interfered with. These considerations do not apply to the work of the Judge who, unlike the jury, does not cease to exist at the end of the case and to whom a case can be remitted. The authorities would seem to bear this out. In the *Banbury Case* the Court of Appeal held that where the Judge of the High Court might have been asked to non-suit the plaintiff or to direct a verdict for the defendant on the grounds of there being no evidence on which a jury could reasonably find for the plaintiff, but had not been asked to do so, they themselves could properly do so where that course had been first suggested on appeal and where they were satisfied that it should have been done by the High Court. In *Dey* v. *Mayo*, [1920] 2 K.B. 346 the decision was that if on raising a point even of law further evidence or further questions might have been available for the jury and that point is raised for the first time on appeal it will be excluded by the Court. In *McDougall* v. *Knight* (1889), 14 App. Cas. 190, the plaintiff did not object to the questions left to the jury, but tried to do so on appeal. It was held that he should not be permitted to introduce matters on appeal which should and could have been submitted to the jury if he had wanted to. In the recent case of *Kwaku Mensa* v. *R.*, [1946] A.C. 88, a prosecution for murder, the point of the possibility of provocation had not been taken in any inferior Court and was raised for the first time in the Privy Council. Their Lordships considered the point and, having come to the conclusion that the jury might have returned a verdict of manslaughter owing to provocation on the evidence given if the question had been left to them, directed a verdict of manslaughter to be substituted. The principle suggested would seem to be a sound one for an additional reason. If on the evidence given a pure point of law arises, but is not argued and, therefore, not considered by the Judge, there seems to be no reason why the Court of Appeal which takes judicial notice of the law should not of its own accord consider such a point and decide accordingly. If that be correct there seems to be even less reason why a pure point of law not argued before

should not be raised by the parties. It may be added that in a case like the present one where the point is not a new one, but one abandond by the party who now seeks to rely on it, the appellate Court should be rather more jealous in exercising their discretion than where the point is a new one.

Du Parcq L.J. said in his judgment that in an action for a tort committed abroad the Statement of Claim ought to allege that the act complained of is wrongful by the law of the country where it is alleged to have been committed. At first sight it is not quite easy to see why this should be so. An act committed abroad is according to *Phillips* v. *Eyre* (1870), L.R. 6 Q.B. 1 actionable in England if (1) it would be actionable as a tort if committed in England, and (2) it is not justifiable by the *lex loci commissi*. The term 'not justifiable' has never been exhaustively defined, but it is generally admitted that it is wider than and includes the term 'actionable' (as a tort). Foreign law is presumed to be the same as English law, and the presumption is, therefore, that, condition (1) *ex hypothesi* being fulfilled, the act complained of is a tort by the *lex loci commissi*. Under Order XIX, r. 25 this presumption need not be pleaded by the plaintiff. Should, which will only happen in a minority of cases, the wrongful act be justifiable by that law, the plaintiff may leave it to the defendant to plead the difference between the two laws; it is the latter who has to prove it in order to escape liability. This view is supported by the fact that in those cases in which the pleadings appear in the reports—*Scott* v. *Seymour* (1862), 1 H. & C. 219 and *Machado* v. *Fontes*, [1897] 2 Q.B. 231—the issue of the justifiability or otherwise of the act by the *lex loci commissi* was first introduced by the defendant. This is also true of *Walpole* v. *Canadian Northern Ry.*, [1923] A.C. 113 and *McMillan* v. *Canadian Northern Ry.*, [1923] A.C. 120. In none of these cases was it suggested that the plaintiff should have pleaded that the act was not justifiable by the *lex loci commissi*. The matter assumes, however, a different complexion if we try to analyse the term 'not justifiable'. Before the decision in *Machado* v. *Fontes* all the decisions dealt with acts which were either tortious or justifiable by the *lex loci commissi*. In *Machado* v. *Fontes* it was held that an act, not actionable as a tort but punishable as a crime by the *lex loci commissi*, was not justifiable within the meaning of the term and that such an act was, therefore, actionable in England as a tort if it was covered by the first

limb of the rule propounded by Willes J. in *Phillips* v. *Eyre*. The next important step is marked by the twin decisions in *Walpole's* and *McMillan's Cases*. Put quite shortly these cases seem to decide that an act through which the defendant has, under the *lex loci commissi*, incurred a liability which, by that law, is not tortious, but imposed by statute independently of any element of tort or crime, is justifiable for the purposes of the rule. It is too early to assess the full significance of these decisions, but it is tentatively suggested that they may mean that an act committed abroad is justifiable unless the defendant has, through that act, incurred a liability which, by the *lex loci commissi* (*vel ommissi*), is either tortious or criminal, or would have incurred such liability but for a purely procedural rule of that law. The authority for the last proviso is *Scott* v. *Seymour*. In that case the defendant pleaded that he could not be sued in tort in the Courts of Naples (the place where the act had taken place) because under Neapolitan law he would have to be prosecuted first (a purely procedural rule). That defence was rejected by the English Court. It must be remembered that this was many years before *Machado* v. *Fontes*; and that the case turned merely on the tortious aspect of the defendant's act.

If this construction be accepted there would seem to be considerable advantages in the course suggested by du Parcq L.J. The plaintiff would then plead that the wrongful act was either tortious or criminal by the *lex loci commissi* (or he would plead these two allegations in the alternative) and the issues would be simplified and clarified. The defendant could then limit his defence to the allegations pleaded by the plaintiff and perhaps plead the rule in *Scott* v. *Seymour*. Were the plaintiff not to raise the issue in the pleadings, he would be understood to plead that the act was tortious by the *lex loci commissi* and the defendant might then plead that the act was not tortious. If the plaintiff then desired to allege that the act was a crime by the *lex loci commissi*, complications would ensue. It is suggested, therefore, that, in order to simplify, shorten and cheapen proceedings, the issues should be split up in the way indicated and pleaded accordingly.

W. A. STEINER.

ANNUITIES PAID 'FREE OF INCOME TAX'

RULE 23 of the All Schedules Rules, Income Tax Act, 1918, which reproduces in almost unaltered form the provisions of section 103, Income Tax Act, 1842, enacts that 'every *agreement* for payment of interest, rent or other annual payment in full without allowing any such deduction (*i.e.*, of income tax—A.F.) shall be void'. It should be added that the agreements are void only as regards the particular stipulation for payment without the deduction of tax—see, among the many cases decided under similar provisions in the Income Tax Act, 1806, *Tinkler* v. *Prentice* (1812), 4 Taunt. 549.

The Courts from an early date have made a sharp distinction between provisions in *wills* for payment of an annuity 'free of income tax' and similar provisions in settlements and other contracts. It was held in *Festing* v. *Taylor* (1862), 3 B. & S. 217, that a devise by a testator of a rentcharge to his widow to be paid 'without any deduction . . . whatever on account of taxes' did not offend against section 103, Income Tax Act, 1842 (cf. *supra*) and so was not void; the omission in section 103 of any reference to 'wills' was held not to be accidental but deliberate and due to the fact that under a will the parties 'take their respective rights from the bounty or forbearance of the testator'. This principle has been repeatedly upheld by the Courts and, in *Inland Revenue* v. *Cook*, [1946] A.C. 1, Lord Maugham observed that it was now far too late to challenge the doctrine. Those interested further in the course of the decisions are referred to the excellent summary in *Dowell's Income Tax Laws* (9th ed.), pp. 762 *et seq.* and to the judgment of the Master of the Rolls in *Re Shewsbury Estates, Ltd.*, [1924] 1 Ch. 135. Whether a will does in fact provide for an annuity to be paid 'free of income tax' is always a matter of construction, *i.e.*, whether the testator has intended to give the annuity and in addition such a sum as would enable the trustees to discharge the income tax due upon the total amount of the annuity and the additional sum, see Swinfen-Eady, L.J., in *Re Saillard*, [1917] 2 Ch. p. 402 and Lord Maugham in *Cook's Case* (*supra*). It should be added that the bequest of an annuity 'free of surtax', as well as of income tax, is good—*Re Reckitt*, [1932] 2 Ch. 144 (C. A.); in such a case the executors must pay that part of the surtax levied on the

whole of the annuitant's income as is proportionately attributable to the annuity.

Where the total income of a taxpayer has to be computed for the purposes of surtax, his assessable income from a 'free of tax annuity' is the amount of the annuity plus income tax at the standard rate on the aggregate of the annuity and the tax—see, for example, *Lord Michelam's Trustees* v. *Inland Revenue* (1930), 144 L.T. 163 (C. A.). Where, in addition to its being 'free of income tax', an annuity is bequeathed 'free of surtax', the 'gross' annuity is deemed to be such an amount as, after deduction of income tax at the standard rate, would leave the actual amount of the annuity devised plus the surtax payable thereon, see *Michelam's Case* (*supra*).

In striking contrast to the principle evolved by the Courts as to 'free of tax' provisions in wills, it has equally long been held that directions in a *settlement* or *contract* for payment of an annual sum 'free of income tax' are absolutely void under the provisions of section 103 or rule 23 (cf. *supra*)—see, among the many cases in the books, *Floyer* v. *Bankes* (1863), 32 L.J.Ch. 610 and *Shrewsbury* v. *Shrewsbury* (1906), 22 T.L.R. 598. This prohibition may, however, be avoided if the wording of the clause exempting the annuity from tax is slightly varied; for example, an agreement to pay 'such a sum as after deduction of income tax shall amount to £x' does not offend against rule 23 and is therefore binding, see *Brooke* v. *Price*, [1917] A.C. 115 and *Re Maclennan*, [1939] 1 Ch. 750, 755.

Mention must be made here of a very important gloss which the Courts have applied in interpreting a bequest of an annuity 'free of income tax', *viz.*, that the testator's intention in such a case must have been that the beneficiary should not obtain more than the actual gross annuity. It was, accordingly, held in *Re Pettit*, [1922] 2 Ch. 765 that where an annuity is given 'free of income tax' under the terms of a will and—as must inevitably be the case—the annuitant is entitled to prefer a claim for repayment of income tax from the Inland Revenue in respect of the personal reliefs and allowances to which he is entitled (sections 17, etc., Finance Act, 1920), then he is liable to hand back to the trustees that proportion of the tax repaid which is equivalent to the ratio which the annuity bears to his total income from all sources; this refund will, of course, go to the residuary estate. The rule in *Pettit's Case* does not, however, apply where a will directs that 'such an

annuity shall be paid as after deduction of tax at the *current rate* amounts to £x'; in such a case the annuitant retains the benefit of any refund made by the Inland Revenue —*Re Jones*, [1933] 1 Ch. 842. Unless such a clause is worded precisely as in *Jones' Case*, *i.e.*, contains the words 'at the *current* (or *standard*) rate', then the rule in *Pettit's Case* will operate. Following the decision of the Court of Appeal in *Maclennan's Case* (*supra*), it was held that the rule in *Pettit's Case* applied to the following types of clauses, *viz.*, 'an annuity of a clear sum after deduction of tax for the time being payable in respect thereof'—*Re Tatham*, [1945] 1 Ch. 35 and 'an annuity *free of income tax* at the current rate for the time being deducted at source'—*Re Williams*, [1945] 1 Ch. 320; the operative words in this latter case were those italicised, the remainder being regarded as mere surplusage; it is upon such 'fine distinction of the language used' that, as Evershed, J., observed in *Tatham's Case*, the operation of the rule in *Pettit's Case* depends. The suggestion of Uthwatt J. in *Williams' Case*, [1945] Ch. p. 322, that the rule in *Pettit's Case* might apply to the assignment of an annuity to a *charity* seems doubtful law since this rule is only operative because the annuitant is entitled to relief from tax by reference to his '*personal* allowances, etc.' and to his 'total income from all sources', see above and Lord Maugham's comments on the rule in *Cook's Case* (*infra*); the title to exemption from tax in the case of a charity depends, however, not on any 'personal' reliefs, etc., but upon the fact that it is a charity—section 37, Income Tax Act, 1918. Finally, it should be added that the rule in *Pettit's Case* applies equally to the non-prohibited clauses re deduction of tax in deeds—*Re Maclennan*, [1939] 1 Ch. 750 (C. A.)—and may only be avoided by the use of the words 'at the standard rate' as in *Jones' Case* (*supra*). Since the judgments in *Re Pettit* and *Re Jones* were expressly, or impliedly, approved by the majority of the Law Lords in *Inland Revenue* v. *Cook*, [1946] A.C. 1, they may be taken as finally expressing the true rule of law as regards 'annuities paid free of income tax'.

The effect of these last-mentioned cases (*Pettit* and *Jones*) upon the annuitant's title to claim repayment of income tax from the Inland Revenue was considered at length by the House of Lords in *Cook's Case* (*supra*). The only income of the annuitant-respondent in this case was an annuity of £100 'free of income tax'; conformably with the rule in *Pettit's Case* she had refunded to the trustees the repayments made

to her in respect of the tax deemed to have been suffered by her upon the annuity. The Crown, however, refused to make any repayment for the year 1939–40. The ostensible reason given was that, because of these refunds, the annuity was not such a sum as after deduction of tax yielded £100, but an amount of £100 plus the tax, if any, that fell *ultimately* to be borne by the annuitant; this additional tax was said to be 'nil' because the respondent's actual total income was below the exemption limit.

By a majority of three to two, the House of Lords rejected the Crown's claim. The *rationes decidendi* given by the majority Law Lords differed, but that of Lord Maugham seems preferable, *viz.*, that, in effect, the respondent's true statutory income was £153 16s. 11d., *i.e.*, the 'gross' sum which, after deduction of tax at the *standard* rate (7s. in the £) would yield the annuity of £100; it was no concern of the Crown that the annuitant had to refund to the trustees the amount of income tax recovered by her. The minority view appears to be that the amount of tax to be added to the actual annuity of £100, *i.e.*, the amount of tax to be paid by the trustees on the annuitant's behalf, should be calculated not by reference to tax at the standard rate but by regard to the amount of tax that would be ultimately borne by the respondent having regard to her total income from all sources, *i.e.*, in the instant case, nothing.

In conclusion, attention may be drawn to the provisions of section 25, Finance Act, 1941, and section 20, Finance (No. 2) Act, 1945, which give relief to the payer of a 'free of tax' annuity in such a way that the tax to be borne by him on behalf of the annuitant shall not exceed the amount that would have been required in the year 1938–39 when the standard rate of tax was 5s. 6d. in the £; these sections, however, apply only to wills executed before September 3, 1939, it being immaterial that the testator may have died subsequent to that date, see *Re Waring*, [1942] Ch. 426 (C. A.).

A. FARNSWORTH.

REVIEWS

WHY CRIME? Some Causes and Remedies from the Psychological Standpoint. By CLAUD MULLINS. (London: Methuen. 1946. ix, 130 pp. 6s. net.)

UNLIKE the same author's *Crime and Psychology*,[1] this book can hardly claim to break any fresh ground. It provides, however, a very useful and stimulating confirmation of what has already been commonly known about certain causal factors of crime. Its greatest value lies in the wealth of practical experience and the profound understanding of the human issues involved which are characteristic of whatever Mr. Mullins writes. The factors which he discusses: Heredity, Parents, Broken Homes, and Illegitimacy, constitute only one sector, though an important one, of the whole field.

There is first heredity. The author complains of 'the almost universal tendency to ignore the hereditary factor in problems of crime'. As far as the theory of crime is concerned this is hardly true. On the contrary, ever since Lombroso perhaps even too much emphasis has been laid on hereditary aspects, although of course in this country, in the U.S.A. and in Soviet Russia the matter has never been so much overdone as in Germany and Italy. It would be easier to agree with Mr. Mullins if his criticism were intended to refer not to the theorist but to the handling of individual cases by criminal Courts. Here it would be justified to say that Courts far too often decide without adequate information on the offender's heredity, and the same applies to many of the penal and reformatory institutions which have to deal with him. An illuminating example of this kind is given in the book (pp. 24—27): the case of P. B., a 'persistent offender', twenty-seven years of age, to whom the author refers as proving the existence of incorrigible criminals. There is not the slightest doubt in the reviewer's mind that such a type does exist, but so far we have hardly reached the stage where we can claim invariably to be able to distinguish between those who would be incorrigible however perfect our methods of diagnosis and treatment may be, and those who are incorrigible only according to our present, very imperfect, methods. 'P. B.'s early years could not be investigated (*i.e.*, by the Juvenile Court before which he first appeared at the age of fourteen)', writes Mr. Mullins, 'since he knew next to nothing about them and the authorities had

[1] Reviewed in 7 MOD.L.REV. 172.

failed to find out more than the probability that he had been illegitimate'. At the age of fourteen he was placed on probation and soon afterwards sent to an Approved School. Surely, it might not have been beyond the wits of men at that stage to obtain some further information on his childhood and, even if the father should have remained an unknown entity, at least on his mother. As things are, it is, however, difficult to see how a case of this kind can be used to prove the significance of heredity. We are in no way opposed to the principal recommendations which the author makes on the strength of his views on the effect of bad heredity, such as detention for life for incorrigibles, sterilisation for the unfit, provided the scientific information required is available. The lack of adequate information of a really scientific nature has been one of the strongest reasons for the failure of Preventive Detention under the Prevention of Crime Act of 1908.

Mr. Mullins is always at his best when dealing with marriage problems. More convincing than ever is his plea for the setting up of some preliminary conciliation procedure in divorce cases where dependent children are involved, and it is certainly true that in the interest of such children nothing should be left undone to prevent ill-considered divorce proceedings. At a time when the technical aspects of divorce procedure are so much in the public mind, these deeper issues should not be overlooked. On the other hand, it might seem going a little too far when the author regards it as at least 'arguable that there should be no full divorce for those who have dependent children'. The chapter on Illegitimacy, too, contains many a useful suggestion which would deserve the careful attention on the part of the legislator.

HERMANN MANNHEIM.

SALMOND'S LAW OF TORTS. Tenth edition by W. T. S. STALLYBRASS, D.C.L., Principal of Brasenose College, Oxford; of the Inner Temple, Honorary Bencher and Barrister-at-Law. (London: Sweet & Maxwell, Ltd. 1945. 1 and 632 and (index) 46 pp. 35s. net.)

IN his latest edition of *Salmond on Torts*, Dr. Stallybrass has continued his laudable practice of writing a full preface explaining the policy and scope of the new edition. He says: 'The law of torts is perhaps the most rapidly developing branch of our law. It is not surprising, therefore, that this volume should be largely a new book'. The changes in substance between this and the 9th edition have been brought about largely by the developments in the law since 1936; the editor

has still refrained from any widespread re-writing, as distinct from re-arrangement. It is good to read that he has 'cut down some of the long lists of cases in the footnotes which appeared in earlier editions'. The original author was prone to a lengthy citation of authorities which were not always relevant. Thus at p. 276, n. (*k*), it is said that Sir John Salmond seems to have thought that certain cases were irreconcilable with two others 'but it is submitted those cases are not *in pari materia*'. The editor usually treats the author kindly when he disagrees with him but at p. 485, n. (*e*), a sharper tone is heard: 'Salmond also cited *Lygo* v. *Newbold* and *Moffat* v. *Bateman*, the latter of which seems quite irrelevant'. At p. 196, n. (*a*), however, the editor feels able to give his support to the author's opinion that there must be actual damage to justify distress damage feasant 'in spite of the doubts of Williams, Animals, pp. 70–6, and Winfield, p. 361. It seems unlikely that the Courts, with their bias against self-help, will override the authorities which support his statement'.

Dr. Stallybrass has 'preferred modern authorities to old, for the modern authorities refer back to the old and the old cannot refer forward to the new'. Probably many readers will regret the passing of some particular old, familiar case, *e.g.*, Mellish L.J.'s well-known judgment in *Woodley* v. *Metro. District Ry.*, 2 Ex.D. 384 is not to be found. It was referred to with approval once more by Asquith J., in *Dann* v. *Hamilton*, [1939] 1 K.B. 509, and may thus be taken to illustrate Dr. Stallybrass's point. The omission of *Evans* v. *Liverpool Corporation*, [1906] 1 K.B. 160 as an authority for the proposition that visiting physicians and surgeons are not the servants of the hospital governors is a more serious loss. *Gold* v. *Essex C. C.*, [1942] 2 K.B. 293 is now cited for this proposition. The section on the liability of a hospital for its staff has, naturally, been re-written in the light of this case, which related to a radiographer, but *Evans* v. *Liverpool Corporation* is still the closest actual ruling on the position of visiting physicians and surgeons. One would also have liked to see *Strangways-Lesmere* v. *Clayton*, [1936] 2 K.B. 11 and its twin decision, *Dryden* v. *Surrey C. C.*, [1936] 2 All E.R. 535, mentioned merely for the purpose of condemnation. In holding that a trained nurse when about her professional duties is not a servant of the hospital these cases were impliedly but, unfortunately, not expressly overruled in *Gold* v. *Essex C. C.* If this had been pointed out it would have prevented a possible source of confusion. (*Cf.* the account of the cases in Winfield, *Law of Tort*, 2nd ed. p. 132, n. (*a*), which might leave the impression that there may still be a difference between nurses and radiographers). *Bowater* v. *Rowley Regis*

Corporation, [1944] K.B. 476 on the defence of *volenti non fit injuria* in an action brought by a servant provides two quotations on pp. 35 and 36, but if the older authority of *Yarmouth* v. *France* 19 Q.B.D. 647 on similar facts were to be retained the *Bowater Case* should have been cited alongside it at p. 38. A discussion of a point raised in argument in the *Bowater Case* but not mentioned by the Court of Appeal would have been welcome, *viz.*, what would have been the position if the servant had in fact expressly agreed to take out the dangerous horse in consideration of the master not terminating his engagement by legal notice? In connection with the same defence the 'rescue' cases are still put on the ground of 'duty' though it is said that a 'moral, no less than a legal, duty negatives the reality of the consent' and *Morgan* v. *Aylen*, [1942] 1 All E.R. 489 is cited. But since this decision is it necessary any longer to talk of duty, even moral duty? If there is no family or similar bond between the rescuer and the person in danger it is hardly accurate to speak of 'duty' at all. A recent case which is not sufficiently dealt with is *Thompson* v. *Park*, [1944] K.B. 409; its relation to the decision in *Hurst* v. *Picture Theatres, Ltd.*, should have been noted at p. 249 in connection with n. (*g*).

The voluminous and important literature on the law of torts which has accumulated since 1936 has been duly noted and skilfully summarised. Although Dr. Stallybrass's language of disapproval of a judgment does not descend below 'unsatisfactory', his vocabulary of praise of an article rises to 'instructive' (p. 234, n. (*k*)), 'valuable' (*e.g.*, p. 137, n. (*g*)), 'very able' (p. 490, n. (*i*)), 'very ingenious' (p. 522, n. (*l*)), and 'excellent' (p. 47, n. (*c*)). At p. 339 thirteen writers are cited in a note to *Stanley* v. *Powell*, but those who wish to read Denman J.'s judgment are not assisted, for a reference to the report of the decision nowhere appears. At p. 533 *Nitrophosphate, etc., Manure Co.* v. *London and St. Katherine Docks Co.* also lacks a reference. At p. 23, n. (*g*), it does not seem necessary to quote Williston on the point that a conclusive presumption 'is a rule of law masquerading as a rule of evidence'. Dr. Winfield's *Text-book of the Law of Tort* is sometimes cited for further details on certain points, sometimes agreement is expressed with statements in that book, and sometimes an opposing view is taken. For example, at p. 373, it is said that Dr. Winfield's opinion that written, as distinguished from spoken, words cannot be defended on the ground that they were vulgar abuse 'is inconsistent with the fact that abuse is one thing, defamation another'. This point and the whole defence of vulgar abuse could have been usefully elaborated. As the defence originated in cases of slander not actionable

per se where there was no special damage is it ever available now under the Slander of Women Act, 1891?

Dr. Stallybrass has 'made some considerable changes with a view to a more logical arrangement of the book' and all these changes can be unreservedly welcomed. There is good reason for the editor's confidence that this is the best edition of the work for which he has been responsible. Few, however, would agree with a passage in the Preface in which, referring to a suggestion that he should have produced an independent study of the subject, he says: 'In self-defence I must plead that I could never hope to produce a book of my own comparable in merit with that of Sir John Salmond'.

W. H. D. WINDER.

PRINCIPLES OF THE LAW OF CONTRACTS. By the late SIR JOHN SALMOND and PROFESSOR JAMES WILLIAMS. (London: Sweet & Maxwell, Ltd. 1945. xxxvi and 640 pp. 35s. net.)

THREE works on the law of Contracts reached us at the beginning of the Long Vacation, and presumably these have, by now, been read and digested by all teachers of law. One was an entirely new work (*Cheshire and Fifoot*); one was the new (19th) edition of *Anson*; and the third (*Salmond and Williams*) is the volume which I have undertaken to review, and which is in part a new work and in part a second edition. Professor Williams, of Sydney University, explains in the Preface the problem with which he was faced and the manner in which he has dealt with it. As all the world knows, Professor Winfield brought out the first edition of Sir John Salmond's manuscript in 1927, leaving the author's *ipsissima verba* intact and adding, in square brackets, his own treatment of topics which Salmond had left unwritten, such as Capacity of Parties and Judicial Remedies. Professor Williams had before him two alternatives, either to repeat Professor Winfield's scheme (adopted again by Professor Winfield in the eleventh edition of Poilock's *Contracts* and by myself in the fourteenth edition of Pollock's *Torts*) of reproducing the text without alteration, or to follow the precedent set by Dr. Stallybrass in successive editions of *Salmond on Torts*, and to rewrite the book, where necessary, in the light of the results of criticism, research and legal decisions since the original work was published. I believe that Professor Winfield and myself adopted the only satisfactory plan in editing Pollock's great text-books, for what the reader wants in each case is the views of Pollock himself. But I am equally convinced that Professor Williams has taken the right course in preparing this second edition of *Salmond on*

Contracts, and that he is fully justified in using a free hand in the revision. Salmond was a great expositor of the law rather than, like Pollock, a great master of it, and a mere verbal reproduction of his views, in a new edition, would have been of little value to students, especially as readers who wish to ascertain his opinions on any contentious matters have only to refer to Professor Winfield's edition.

For the most part, therefore, *Salmond and Williams* is a new contribution to legal literature and is to be appraised as such. A glance at the Table of Cases will show how much fresh matter has been introduced. Under the letter 'A' *Salmond and Winfield* indexed twenty-six cases, six of which do not appear in this edition, but *Salmond and Williams* cite no fewer than sixty-five decisions. *Cheshire and Fifoot* list thirty-nine cases under 'A' (excluding the 'Anons.'), and *Anson* thirty-four. Of course, the practitioner's books give many more references: *Leake* has some 330 cases under the letter 'A', but it is noteworthy that, excluding American and colonial decisions, and those which have been given since Leake's last edition (1931), Professor Williams has made use of as many as fourteen cases which start with this initial letter which are not in Leake's long table. This confirms the impression that one receives on a first reading, that there is much original matter in this edition. Many older authorities of interest have been explored, and by this means fresh light is often thrown upon dark places. *Loftus* v. *Roberts* is a good example of this: it is the best illustration in the reports (and is used as such on p. 195) of the need of certainty in expressing the terms of a contract, and it is constantly cited in practice; yet one looks for it in vain in all ordinary text-books. The actual language used by judges is frequently reproduced in the text; and there are learned footnotes throughout, such as the scholarly examination of *Dies* v. *British, etc., Corporation* (pp. 569—571), where at least 1,500 words are used and there is an elaborate exposition of Tindal C.J.'s judgment in *Fitt* v. *Cassanet*.

Enough has been said to show that this work is an important contribution to the literature upon the law of contracts, and it is pleasant to think that the Antipodes have produced another lawyer, like Sir John Salmond, who has keen insight and deep erudition, and in whose hands, one feels, the development of our law in the most remote of our Dominions is safe.

The work is more suitable for advanced students than for beginners. My own young men, I know, will be greatly alarmed when they realise, on reaching p. 23, that Professor Williams defines a contract as 'either (i) a declaration of the will of a person or the combined declarations of the wills of several persons, creating and defining a non-testamentary

common law obligation or obligations binding the declarant or declarants in favour of the person or persons indicated in that behalf in the declaration or declarations; or (ii) the combined declarations of the wills of several persons, which declarations coincide with each other in point of content and actually or constructively in point of time, and create and define a non-testamentary common law obligation or obligations between the several declarants'. Young men, who like to learn their definitions by heart, will be somewhat perturbed by this ultra-Austinian analysis. What has happened, of course, is that Professor Williams has been led, or misled, by Salmond into forcing the English law of contract into the 'uncomfortable strait-jacket' of jurisprudence. From a purely juristic point of view, no doubt, contract has never been more adequately defined. There is not a loophole. But what has all this to do with the English law of contract? In English law, a contract is an obligation which, before 1852, was enforceable by one of the writs (whether actually or presumptively issued) of Debt, Covenant or Assumpsit. Ought not the ignorant beginner to be told this? Should not his first lesson in the study of contracts be, that no action would lie before 1852, or will lie in 1946, unless one of these remedies would, in those distant years, have been available?

This juristic inception leads inevitably to the exclusion from this work of any adequate treatment of what the jurists call 'quasi-contract'. In other words, here we have what is, in effect, a new text-book on the law of contract, and the reader is nowhere told, except incidentally, about the action for money paid, the action for money had and received, and the action upon an account stated. But, so long as we are the victims—or (*pace* Lord Wright) the beneficiaries—of the dichotomy of the Common Law Procedure Act, 1852, actions to recover debts, whether they are contractual debts or quasi-contractual debts or debts of record, must be treated as part of the English law of contract; and a text-book that does not deal with obligations of this type is not a complete exposition of this branch of the common law.

In passing, it may be noted that both *Cheshire and Fifoot* and the new edition of *Anson* place the proper emphasis upon the historical basis of the law of contract, and Professor Brierly is to be congratulated for having remedied what was an obvious defect in all previous editions of the latter work by adding a valuable section on the early writs.

The only other serious weakness in this new volume is the treatment of the measure of damages, pp. 583–589. Professor Williams, in the teeth of cases like *Bostock* v. *Nicholson*, asserts categorically that the two rules in *Hadley* v. *Baxendale* are really reducible to one rule, being 'two alternative

definitions' of the same measure of damages. He is at liberty to hold this view; but he should surely warn the student that it is not the ordinary interpretation of *Hadley* v. *Baxendale*, and that Professor Winfield, in the first edition, adopted an entirely different (and more orthodox) doctrine. The curious thing is that he cites *Re Hall and Pim*, where the speech of Lord Phillimore is quite at variance with the treatment in the text. And he makes no reference to such leading authorities as Lord Esher in *Hammond* v. *Bussey*, Lord Bowen in *Finlay* v. *Chirney* and in *Cobb* v. *G. W. R.*, and Lord Sumner in *Weld-Blundell* v. *Stephens*.

A few further comments may be added. Professor Williams is inclined to invent a new connotation for such terms as Undertaking, Condition, Promise, Warranty. A writer may, of course, adopt any nomenclature he pleases; but these terms are largely terms of art, and Professor Williams is forced to point out (p. 49, note (*w*)) that his definition of warranty, for instance, is 'both wider and narrower' than that given in the Sale of Goods Act. And it is strange to learn (p. 24) that the expression 'verbal contract' may include a written contract. The unscholarly error of treating the plea of *non est factum* as a defence in an action of assumpsit is inherited (p. 212) from the old Salmond.

Recent articles in legal periodicals are frequently referred to, but two instances where such contributions have been overlooked, and where they would have been helpful, are Mr. Hammelmann's article on *Seddon* v. *N. E. Salt Co.* in 55 L.Q.R. 90 and the note on *Doyle* v. *White City Stadium*, 51 L.Q.R. 270. A perusal of the latter might cause Professor Williams to reconsider his rather startling proposition on p. 301 (though he puts it forward 'with diffidence') that where an infant has contracted in respect of necessaries provided or to be provided for him, and the contract as a whole is for his benefit, he is liable on the contract as fully as an adult would be. In connection with *Phillips* v. *Brooks*, Professor Williams closely (and wisely) follows Professor Goodhart's article in 57 L.Q.R. 228, but he should tell the reader that there are two possibilities as to what North said to Phillips when he entered the shop, and *Lake* v. *Simmons* should be cited.

Like other lawyers, Professor Williams is puzzled by section 56 (1) of the Law of Property Act, 1925, and no doubt others, like myself, have been greatly disconcerted at the proposition which Lord Atkin added to the article on Contract in *Halsbury* (2nd ed., Vol. VII, p. 68), stating that the effect of this section is to enable a person to take the benefit of any covenant respecting any kind of property, although he is not a party to the instrument (cf. also Jenks' *Digest* (2nd ed., Art. 242), a passage for which I must, with Professor Lee, share

the responsibility). But the misconception arises from omitting the all-important word 'named' in the phrase 'named as a party'. The enactment in question, like section 5 of the Real Property Act, 1845, which it replaces, is simply intended to abolish, both in personal and in real property, the old technical rule (neatly illustrated in *Berkeley* v. *Harding*) that no one can sue *upon an indenture* unless he actually put his seal to the indenture. The person suing must, of course, be entitled to enforce the covenant, though he is not 'named in the indenture' as a party. He must be a covenantee. The difficulties disappear when it is remembered that at common law a covenantee could always enforce a deed poll against the covenantor; the technical rule only applied to indentures. However, I must not write more about this topic, for I have reason to believe that Dr. Hanbury is about to direct his artillery upon it; flashes from his guns are already scintillating upon the distant horizon.

One of the most interesting chapters is that entitled 'Contracts in Trust for Third Persons', where many authorities are collected from the equity reports which do not appear in other text-books. *Lister* v. *Stubbs*, however, is not cited; nor is the 'disturbing dictum' in *de Mattos* v. *Gibson*, nor the decision in the *Strathcona Case*, now condemned by a chorus of disapproval led by Lord Greene in *Clore* v. *Theatrical Properties* and *Greenhalgh* v. *Mallard*. The next edition should deal with these cases.

The following chapter on 'Assignment', again, is a useful monograph; Professor Williams follows the careful exposition of Atkinson J. in *Holt* v. *Heatherfield Trust, Ltd.* on the vexed question of equitable assignments without consideration.

The book can, without hesitation, be recommended to advanced students.

P. A. LANDON.

RECENT TRENDS IN ENGLISH PRECEDENT. By JULIUS STONE. (Sydney: Associated General Publications Pty. Ltd. London: Stevens. 1945. vi, 76 pp. 10s. 6d.)

PROFESSOR Stone has put into a short course of lectures, here republished, part of his forthcoming volume on the Province and Function of Law. Having read them with much pleasure and not a little profit I am glad not to have been kept waiting for the large book, though to that I shall certainly look forward with anticipation.

The theme of the present volume is that perennial topic of discussion among lawyers, law and logic. Although this has occasioned so much dispute, has given rise to many wise sayings, and has formed the subject-matter of numerous chapters,

it is curious how little systematic and substantial work has been done upon it. A comprehensive survey such as this, especially when the subject is so competently handled, is therefore of real value, and cannot fail to meet with a welcome from all students of the functioning of law in society.

Professor Stone precedes his analysis of the recent English case history by short studies of the use of logical methods in the interpretation of the French and German Civil Codes. His object is to discover just how far away from the realities of life a strict adherence to logical method can lead a jurisprudence, and just what fallacies are likely to arise. The answer is that only commonsense and the practical necessities of the situation prevent a completely artificial and theoristic jurisprudence from coming into existence.

Turning to English law, Professor Stone finds that it makes very little difference whether one is on common law ground or civil law ground. The application of strict logical form to the problems of either system leads to similar lop-sided developments and stultifications.

The English judicial achievement is analysed in relation to the needs of social change, and the analysis is conducted in considerable detail and with much power. The difficulty is, of course, not altogether due to logic as such, but to the fact that the average judge is not sufficiently a technical logician to use the weapon of logic to full advantage, nor is he a man of sufficiently wide imagination to appreciate that his mistaken use of logic may lead to serious social consequences, as in the well-known doctrine of common employment. The big figures of course know better, and such names as Holmes and Atkin naturally occur frequently. Lord Wright, too, is often quoted, and with reason, for in some ways he has a more penetrating conception of the purposes fulfilled by a judgment in the building up of a jurisprudence than have the others, profound as was their insight.

To one of the founders of this *Review* it is very gratifying to notice the very substantial use which Professor Stone has made of the material which has appeared therein.

CHORLEY.

MARRIAGE, SEPARATION AND DIVORCE. By H. B. GRANT, M.A., Barrister-at-Law. (London: Stevens. 1946. 130 pp. 3s. 6d. net.)

MR. GRANT has cheerfully undertaken a task which would have daunted most of us, an explanation of the law of marriage and matrimonial causes in no more than 130 small pages and in a manner suitable for the lay reader.

Until I read this book I did not think it could be done. Having read it, I thought that it had been done. Still, it was difficult for a lawyer to pass final judgment. I was sure that Mr. Grant had summarised in masterly fashion the whole range of legal incidents from the contract to marry to the dissolution of the marriage, but only the lay reader himself could say for certain whether it would be interesting and fully intelligible to one unused to legal phraseology. I therefore tried it on my wife. Her initial reluctance to sample one of my 'dry old law books' was speedily overcome and she finished it at a sitting. Her verdict is that it is perfectly intelligible and most interesting throughout and that she has learnt a lot that she thinks she ought to have known (I fear I may have made a rod for my own back).

Mr. Grant owes his success to his felicitous style—racy without being flippant, to his flair for selecting illustrating examples, and above all to his gift of reducing legal rules to their essentials. The result is a book costing no more than the price of a seat at the local cinema, which all may read with advantage. Even the expert will find a study of it profitable if only to show him how the law can and should be explained to the public—a thing which practitioners try to do daily but with varying degrees of success.

It may be thought that exaggerated praise and disproportionate space has been given to a work which admittedly makes no pretensions to original scholarship. I do not agree. Of all branches of the law this touches the public most closely and its principles should be known to all. The means of knowledge are now available. How many books of greater research and learning fulfil as useful a public service?

L. C. B. G.

A TEXTBOOK OF THE ENGLISH CONFLICT OF LAWS. By CLIVE M. SCHMITTHOFF, LL.M.(LOND.), LL.D.(BERLIN), Barrister-at-Law. (London: Pitman. 1946. xlvi. 455 pp. 35s. net.)

A NEW textbook on Conflict of Laws is inevitably compared with Dr. Cheshire's masterly treatise and few writers can hope to face this comparison unscathed. It is a tribute to the excellence of Dr. Schmitthoff's book that it stands up to it so well, and where it fails it is largely due to circumstances beyond the author's control. Dr. Cheshire's book is a joy to read and to handle, partly because of its delightfully easy style and partly because of its admirable format and typography. Dr. Schmitthoff cannot quite rival the style (few, if any, legal writers can) and his publishers cannot assist him

as Dr. Cheshire's did in pre-War days. This is a pity, because perhaps the most important feature of a student's textbook is that it should attract its readers. Nevertheless the book is well and clearly written and is a thorough exposition of the law as it stood at the end of the War. It can be wholeheartedly recommended, especially to students with some prior knowledge of the subject, and by present-day standards its price is very reasonable.

This branch of the law is perhaps the least developed of any and widely divergent views can be and are still held by different writers; it is this fact that makes the subject so attractive to academic lawyers and so repellent to the practitioner. Where different views have been expressed Dr. Schmitthoff summarises the various opinions and is not afraid to express his own, which in general are orthodox and sensible, displaying few of the flashes of almost whimsical originality which delighted some, and shocked others, of Dr. Cheshire's readers.

In view of the fluidity of the law, criticism can be no more than the expression of a personal opinion. The chapter with which I personally am least happy is that on the vexed question of the Assignment of Movables which seems to me to paint a very confused picture. Dr. Schmitthoff would doubtless retort, with some justification, that in the present state of the law a confused picture is an accurate picture. But with respect I think his treatment leaves confusion worse confounded than it is. For example, he seems to me to overemphasise the distinction between corporeal and incorporeal movables (if order is to be brought out of chaos, surely this distinction must be minimised?) and although in both cases he favours the *lex situs* as the guiding principle, it is only in the case of incorporeal movables that he appears to recognise and provide for the difficulty that there may be more than one assignment of the same thing each valid by its *lex situs*. But perhaps it is unfair to complain because Dr. Schmitthoff has not blazed a clear trail for us; he is not the first gallant explorer to have got lost here.

I also quarrel with his treatment of Administration of Assets. It is the common fault of academic textbooks that they tend to give an unreal impression of the normally non-contentious Probate practice, and this book is no exception. No doubt it is unimpeachable in theory to say as in effect the learned author does, that the Probate Court has a complete discretion in granting probate which it will normally exercise in favour of the administrator appointed by the law of the domicil (p. 220). In practice, however, the position is simply that the Probate Registry make a grant as a matter of

course either to the person entitled under English internal law or to the person entitled under the *lex domicilii*. And as for the statement (at p. 225) that the English ancillary administrator should before distributing obtain the directions of the Court, if this means that in the normal case he should not transfer the assets to the foreign principal without a Court order, the highly inconvenient rule suggested is happily not part of the English law or practice.

Nor do I agree with the strictures (at p. 320) on the recent attempts by the Courts to do away with the distinction drawn in *Inverclyde* v. *I.* between void and voidable marriages, and the statement (at pp. 305 and 322) that the nullity decree of a foreign Court of domicil has no effect on a validly celebrated English marriage, is, to say the least, doubtful. Further, the discussion of polygamous marriages must now be read in the light of *Baindail* v. *B.*, [1946] 1 All E.R. 342 which was unfortunately decided too recently for inclusion.

On the other hand, Dr. Schmitthoff's views frequently come like a welcome breath of fresh air; one example among many is at p. 234 where he points out that as the interpretation of wills depends on intention it is futile to enter into discussions on *lex domicilii* at death *versus lex domicilii* at the date of the will.

I cannot do better than conclude with the final sentence of Lord Macmillan's appreciative Foreword: 'I have found the reading of this book an excellent "refresher course" . . . and I commend it as a convenient work for the practitioner to consult and, perhaps especially, as an admirable manual for law students.' As one in much greater need of a 'refresher course', I respectfully concur.

L. C. B. G.

LIBRARY OF CONGRESS: ANGLO-AMERICAN LEGAL BIBILIOGRAPHIES. AN ANNOTATED GUIDE. By WILLIAM L. FRIEND. (Washington: United States Government Printing Office. 1944. pp. xiv, 166. $1.50.)

The first thirty-six pages are a most interesting survey of the history of the efforts of law publishers and lawyers generally to take stock of their professional literature, both in England and America. For the most part they were book-sellers' stock lists, or sometimes guides to students; both classes are well represented in our own day by useful reference works. Scientific legal bibliography has never been very common, but the American contributions are outstanding, and it is good to have Mr. Friend's detailed accounts of the classic work of Wallace on the reporters and Soule on the Year Books.

The work is not confined to legal antiquities, and gives bibliographies (where they exist) of such current subjects as aviation law, the constitutional aspects of the recovery programme, besides regional and personal bibliographies. Most of these did not appear as separate books, and so the compiler has sought his material in the vast wilderness of legal periodicals, bar association proceedings and lists appended to treatises, biographies and the like. A perusal of the 298 titles cannot fail to arouse regrets in English readers that so few of the references are to be found in this country. It would be easy to suggest additions to the list, and some of the details given could well have been spared, likewise many elementary students' lists. Since the work has undertaken to discover bibliographical material contained in other works, it is regrettable that the long and valuable bibliographical sections scattered in Holdsworth's *History* have not been listed; and quite inexplicable that the reference to that work in entry 146 should be to the edition of 1908.

T. F. T. PLUCKNETT.

THE EXPROPRIATION OF FOREIGN-OWNED PROPERTY IN MEXICO. By WENDELL C. GORDON. With an Introduction by SAMUEL GUY INMAN. (Washington: American Council on Public Affairs. viii and 201 pp. $2.50 net.)

THIS book is devoted to an exposition of the vicissitudes suffered by Mexico's foreign investors. After a short description of the background of the expropriations Dr. Gordon deals in three chapters with the Mexican Land Reform, its economic development, the municipal laws controlling it and its international aspects. The following six chapters describe the fate of the oil industry, *viz.*, its economic development, its legal status, its international and economic aspects, the confiscatory legislation and the attempts at a settlement of the oil controversy. The remaining chapters deal with the position of the railways, future expropriations, international law and the future of the problem. As the preface explains, 'the domestic, economic, social and legal conditions are used as a background for considering the expropriation of property in its international aspects and with regard to its legality under international law'. Although the presentation of the material is perhaps not altogether inspiring, and although the author does not engage in any profound discussion of the problems, his work is useful for its assembly of extensive factual material, and, objectively written as it is, it merits the attention of those interested in the peculiarities of the Mexican situation.

F. A. MANN.

A HANDBOOK ON THE DEATH DUTIES. By H. ARNOLD WOOLLEY, Solicitor of the Supreme Court. Fifth Edition. (London: The Solicitors' Law Stationery Society, Ltd. 1945. xxxiv, 271 pp. 21s. net.)

The field covered by the Death Duties is so extensive and the subject of so abstruse and involved a nature that a detailed analysis of this excellent work would hardly be in place in this *Review*. Though Mr. Woolley's book is specially written for the busy practitioner who does not wish to refer to 'Dymond' or 'Green', yet it contains so readable and clear an account of the main constituents of the duties that it is an ideal work for the law student who is commencing his study of this recondite subject. The fact that the work has run to five editions, of which three are war-time, is proof enough of its accuracy and comprehensiveness; there are, however, some features which deserve special consideration.

The author's method of illustrating his points by practical examples throughout the text is to be especially commended; the law student, in particular, will appreciate the final chapter (XVIII) which sets out in considerable detail the duties arising in connection with eight specimen estates of varying magnitude and complexity, together with useful notes as to the accountable parties and the differing rates of duty. Both the Legislature and the Courts have, of recent years, severely restricted opportunities for 'legal evasion' of the death duties, but Mr. Woolley's experience as a practising solicitor has enabled him to devote two very interesting and useful chapters to 'Mitigating the Duties' (XVI) and 'Duty-saving Testamentary Dispositions' (XVII). Those whose duty it is to advise testators will, however, do well to heed the author's admonition that his remarks in these chapters 'constitute as much a warning against what had better not be attempted as a lead to what can properly be done', especially having regard to the recent tendency of Parliament to legislate *retrospectively* against 'tax-dodging' schemes. The attitude of the Courts towards tax evasion has changed considerably in the last half century, contrast Chitty L.J.'s remarks in *Att.-Gen.* v. *Beech*, [1898] 2 Q.B. 147, 157: 'The case falls within the Act or its does not. There is no such thing as evasion. . . .' with those of Lord Simon L.C. in *Latilla* v. *Inland Revenue*, [1943] A.C. 377, quoted in full in the note on this case at 6 MOD.L.REV. 244. An attack in force upon evasion of the duties was launched by the Finance Acts of 1939 and 1940, and a most useful summary of their effect is contained in Chapter XV. Mr. Woolley comes to the conclusion that, as a result of their provisions, no substantial saving of the duties can be effected by forming a

' controlled ' company, and suggests that better results can be obtained by forming partnerships.

The chapter on Domicil (XIII) is on the slight side though it contains a useful note on the ' Proper Law ' of Settlements (pp. 144 and 170). The definition of ' ordinarily resident ' as ' the place where a man means to spend most of his time and have his principal home '—*Ex p. Cunningham* (1884), 13 Q.B.D. 478—does not accord with the developed modern law of residence. Recent decisions of the House of Lords—cf. *Inland Revenue* v. *Lysaght*, [1928] A.C. 234, and *Levene* v. *Inland Revenue*, [1928] A.C. 217, show that the term ' ordinarily resident ' has no special technical meaning, and that it may best be defined as residence which is habitual and part of the regular order of a man's life.

The practitioner's attention is specially directed to that portion of Chapter VII which deals with the incidence of colonial and foreign duties and the consequential possibility of double taxation. At pp. 80–4 will be found a most useful statement on the position of shares in South African companies which have duplicate London Share Registers, and also a reasoned criticism of the decision on this point in *Farrar's Estate* v. *C.I.R.* (S.A.L.R. [1926] T.P.D. 501).

Mr. Woolley comments upon the expense attending executors in contest rulings of the Estate Duty Office through the Courts and suggests that, where the taxpayer succeeds in the Court of first instance, the Crown should pay the costs of both sides in any appeal to a higher Court; there is, perhaps, more to be said for this view than a similar one of Dr. C. K. Allen in his recent book *Law and Orders*, where he suggests that revenue appeals should be confined to a Divisional Court of three judges sitting permanently in session.

The Index is very adequate and has been carefully compiled; a useful feature is the ' Summary of Recent Statutes ' (1925–1944) which will be found at pp. xxxi–xxxiv. In conclusion it can safely be said that not only will the practising lawyer find the work most useful for quick reference and as respects the practical application of the duties, but the law student, too, can ask for no better introduction to the subject of the Death Duties; in fact, the fourth edition of the work was the prescribed book for the Law Society's Final Examination.

A. FARNSWORTH.

IMPOSSIBILITY OF PERFORMANCE IN CONTRACT. By R. GOTTSCHALK. (London: Stevens. 1944. xvi, 146 pp. (with index), plus 28 pp. supplement. 10s.)

THIS is a reprint of the first edition of this book, with the addition of a supplement in which the recent decisions are

digested from the date of the original appearance of the book in 1938 down to 1944. Among these is a two-page précis of the Frustrated Contracts Act of 1943.

This book was reviewed by Miss Jaffee in 3 MOD.L.REV. at p. 172. At the time of its appearance the literature on the subject in this country was confined to articles in periodicals. Since then, however, we have had Sir Arnold McNair's excellent volume on *Legal Effects of War* (see 8 MOD.L.REV. 86), Mr. George Webber's substantial *Effect of War on Contract* (see 3 MOD.L.REV. p. 233), and others. Dr. Gottschalk's book will not stand comparison with these in its analysis of the English decisions, nor in its interpretation of the English doctrine. Its main value lies in its interesting comparative treatment of the Roman law of cases and in its references to articles from American legal journals which are extensively quoted, as are the relevant passages from the Restatement.

Some of the later cases, especially the *Fibrosa Case*, [1943] A.C. 32, have thrown much light on the subject, and the Frustrated Contracts Act, 1943, has, of course, completely revolutionised important aspects of it. The reviewer finds it difficult to commend an author who only deals with such matters by way of supplement. Substantial portions of the main text should clearly have been rewritten. Until this has been done the book cannot be regarded as a satisfactory introduction to this difficult subject.

CHORLEY.

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THE FUTURE OF THE ENGLISH LEGAL PROFESSION

At a time when large numbers of barristers and solicitors are returning from war service to their chosen profession it seems appropriate to try to forecast what the future (if any) of the legal profession is likely to be. I say 'if any' since there is one school of thought which professes the view that England is rushing headlong to an anarchy in which there will be no law worthy of the name and in which the legal profession will either perish or be absorbed into the civil service—the latter fate, one gathers, being regarded as rather worse than death. But although vocal expression is given to this point of view in the Inns of Court and the Law Society's Hall, most of its protagonists do not seem to take themselves very seriously and genuine advocacy of this theory seems, in the words of the Prime Minister, to be virtually limited to the lunatic fringe.

Nevertheless, there is no doubt that social conditions in England are undergoing a radical change and that the legal profession, whether it likes it or not,[1] will have to undergo radical changes also.

A. THE FUTURE LEGAL SYSTEM

Before we can attempt to visualise what these changes are likely to be, it is necessary to have a general idea of the legal system in which the profession will have to operate. I start, therefore, with the following hypotheses which will I think command fairly general acceptance as the likely line of development irrespective of the political colour of the government of the day, although of course the speed of this development will depend on the party in power from time to time:—

1. The English social system will become increasingly Socialistic in the sense that it will adopt a planned economy designed to provide social security and equality of opportunity for all.

[1] On the whole it will not like it. The legal profession is averse to change, as recent meetings of the Bar and the Law Society have made clear. But the medical profession was equally averse. . . .

2. Its main features will be:—
   (a) A gradually increasing range of social services sponsored by the State.
   (b) Nationalisation of the key industries.
   (c) High taxation of income during life and of capital at death. This will be necessary to maintain the social services and will also lead (and be designed to lead) to a gradual elimination of the higher income groups and a levelling up of capital and income among all classes.[2]
   (d) An increasing degree of bureaucratic control.

3. These developments will lead not to less law but to more. The view sometimes formerly held that Socialism entails the eradication of any legal system in the orthodox sense is sufficiently disproved by present experience in this country. We have already moved some considerable distance along the road to Socialism and the result has been a vastly increased range of legal regulations affecting the man in the street to a greater extent than ever before, so that the legal profession as a whole is larger and busier than ever. It is also disproved by the experience of the U.S.S.R. and this despite the fact that there Socialism was introduced by civil war and revolution.[3]

On the other hand the legal system is likely to differ somewhat from the present both as regards content, method of creation, and the nature of the Courts in which it is enforced.

As regards content, the emphasis will change from private law to public law—from private contract to public regulation. This tendency is already very much in evidence. It has received a new impetus from the War and from the present Labour Government, but was noticeable long before either and was manifested in a wide range of subjects.[4] As the State increases its social services and its control over fields formerly left to private enterprise, the growth of Administrative Law in the Continental sense seems inevitable and the English

[2] The rate at which this is already proceeding is shown by the fact that the number of individuals with a net income of £6,000 per annum and over has shrunk from 7,000 in 1938–9 to sixty in 1944–45. Similarly, of tax payers whose net incomes exceed £150 per annum, only two and a half per thousand have net incomes of over £2,000 as against nearly eleven per thousand in 1938–9.

[3] See Schlesinger, *Soviet Legal Theory*, which makes it clear that despite popular belief the present Soviet legal system does not differ so very fundamentally from that of capitalist States.

[4] Note, for example, the extent to which in the last fifteen years the place of private law Restrictive Covenants has been usurped by public law Town Planning Schemes.

lawyer will have to reconcile himself to something like that Droit Administratif which Dicey taught him to fear without understanding. On the other hand, if the future method of nationalisation can be deduced from the present samples,[5] it seems that this is likely to involve less startling legal changes than might have been the case if, instead of setting up special boards and corporations, the State had attempted direct control of the nationalised industries through the civil service.

As regards the method of creating law, there seems little doubt that this will depend, in any increasing range of subjects, on rules and orders rather than on judicial decisions or on direct Parliamentary enactments. This is an old topic of controversy [6] into which I have no intention of entering. For our purpose it is sufficient to note that the trained lawyer is needed just as much to interpret and advise on law flowing from S. R. & O.s as he is on law created by Act of Parliament or judicial decision.

Finally, as regards the Courts. We must clearly expect an increase in the number of special tribunals, the growth of which has already caused disquiet in certain circles.[6] The creation of *ad hoc* tribunals is becoming almost common-form in recent legislation [7] and the habit has spread from the area of industrial relations and purely administrative law to a field in which the ordinary Courts have hitherto held undisputed sway. Thus the Furnished Houses (Rent Control) Act, 1946, sets up special local tribunals to which either landlord, tenant, or local authority can apply to fix the fair rental of a furnished letting, and it seems likely that this is the first step towards the establishment of Rent Courts to deal with all rent disputes. The present position is most anomalous since we have the normal Courts dealing with 'unfurnished' tenancies in one way under the Rent Restriction Acts and the special tribunals dealing with 'furnished' tenancies in another way. The likely solution of special Rent Courts to deal with the whole problem will, of course, mean that freedom of contract in such cases will largely if not wholly disappear.

The extent to which these special tribunals will encroach

[5] For an interesting discussion of certain of the legal implications of nationalisation, see XLVI *Law Journal Newspaper*, pp. 297 and 311.

[6] See, for example, Hewart, *The New Despotism*, C. K. Allen, *Bureaucracy Triumphant* and *Law and Orders*, and Lord Chorley's article on the latter at 9 MOD.L.REV., p. 26.

[7] Recent examples are the Family Allowances Act, 1945, the War Damage (Valuation Appeals) Act, 1945, and the Furnished Houses (Rent Control) Act and the National Insurance (Industrial Injuries) Act of 1946.

upon the normal judicial system will no doubt depend mainly on two inter-related factors: (1) On the extent to which public opinion continues to regard impartiality based on independence and absence of any prior knowledge of the facts as preferable to a specialist's familiarity with the problem and its implications; and (2) On the extent to which the outlook of the judiciary lags behind public opinion.[8] The view expressed by Scrutton, L.J., that 'the less social knowledge displayed by the Judge the better', may sound admirable in theory but does not work in practice. As Cardozo pointed out,[9] it is utterly impossible for any Judge completely to divest himself of his subconscious social loyalties, and hitherto the subconscious loyalties of the English Judge have tended to sway him towards the preservation of the *status quo* and towards giving greater weight to the interests of the individual than towards the interests of the State. He may be right; but the fact remains that public opinion is tending in the opposite direction,[10] towards the view that the benefit of the many justifies very considerable interference with the interests and freedom of the few.[11] The extent to which the 'new law' will be entrusted to the ordinary Courts will undoubtedly depend on the extent to which the occupants of the Bench pay regard to the spirit and purpose of legislation in their interpretation of its letter and on how far they display any subconscious prejudice against social (and Socialist) experiment.

It may be objected that another and even more important reason for the setting up of special tribunals is the excessive expense and delay of litigation in the ordinary Courts. Undoubtedly this is a powerful reason at the present time, but in my view the expense and delay can and will be cured[12] not by setting up a multiplicity of special Courts but by reforming the present judicial system. For, whatever the faults of the present system, a powerful and independent judiciary is a safeguard against any form of totalitarianism —a safeguard which we can ill afford to see destroyed.

But even if there is a substantial increase in the number and range of special tribunals, it is doubtful if this will

8 For an example of this lag, see *Sutherland* v. *Stopes*, [1925] A.C. 47.
9 *The Nature of the Judicial Process.*
10 And to some extent the opinion of the Bench is changing in conformity, as is illustrated by the different outlook now displayed towards Income Tax Evasion.
11 The village of Stevenage must die that the county of London may live.
12 See below for some methods suggested as likely.

materially diminish the work for lawyers. While it is no doubt true that strict rules of procedure and evidence will be dispensed with and that to this extent it will be easier for the layman to argue his own case, the fact remains that the average person will still prefer a lawyer to argue his case for him. And he will be right; for a lawyer has been trained to separate essentials from non-essentials and to present an argument logically, clearly and, yes, comparatively briefly. A lawyer will, therefore, have just as great an advantage over a layman in arguing before a tribunal set up, for example, under the Furnished Houses (Rent Control) Act as in a county court under the Rent Restriction Acts.[13]

But there is also a tendency towards restricting the right to legal representation before such tribunals. Thus, the Government spokesman in the debate on the National Insurance (Industrial Injuries) Bill indicated that lawyers would not be permitted to appear before the tribunals to be set up to take the place of the county court in workmen's compensation cases. As a result of representations by the Council of the Law Society and the Bar Council this was modified to the extent of permitting it in those cases where the tribunal considers it reasonable, but not as of right. This attitude I regard as indefensible. To devise a system so non-technical that no one would want to employ a lawyer would be one thing, and lawyers could not fairly complain of that; but to take away a man's right to appear by a lawyer if he wants to, is quite another. It is only understandable on the ground that a party appearing by a lawyer will be at such an advantage that the other party will be forced to do likewise. This is flattering to us, and supports the views expressed above, but the solution is not to deny the right to legal representation but to make it freely available to both sides.

To sum up therefore, I take the view that there will in the future be plenty of work for the lawyer, if only the legal profession is organised in such a way that it can take advantage of it.

[13] Perhaps more, because in the county court the learned Judge will give the layman the utmost assistance whereas a lay tribunal is likely to lose patience with him and to be exaggeratedly impressed by the lawyer's forensic skill.

B. BASIC FAULTS OF THE PRESENT ORGANISATION OF THE PROFESSION

The present organisation of the legal profession in this country has, to my mind, three basic faults. Even at the present day they constitute serious flaws; if the forecast which has been made above has any measure of accuracy they will in the future become so grave that the demand for reform will be irresistible. These faults are:—

1. The services of the legal profession are too expensive.

This, I think, is undeniable. Despite the fact that the legal profession as a whole is not overpaid (on the contrary [14]), nevertheless legal advice and assistance is a luxury that few can afford. Moreover, so far at any rate as concerns litigation, it is too often true that the deeper the purse the greater the chances of success. At the present day we cannot even claim that, in the words of the old taunt, justice is as open to all as the Grill Room at the Ritz Hotel, for the Ritz is now subject to price control whereas the sky is still the limit so far as the fees of a fashionable silk are concerned. I do not think that today anyone would seek to defend this state of affairs; the Rushcliffe Committee's Report and the profession's response to it show that the flaw is recognised and deplored.[15]

2. The period of apprenticeship is too long, the expenses of qualifying are too great, and the rewards are too long delayed.

The minimum period of training is three years in the case of a barrister and five years in the case of a solicitor. If a Laws degree is taken at a University these periods are increased. During the whole of this time the trainee earns nothing and his actual out-of-pocket expenditure on fees and premiums is likely to exceed £400.[16] And even when he has qualified he may still not be self-supporting; it will be many years before a barrister will earn enough to keep himself (let alone a wife and family), and a newly-qualified solicitor will be lucky if he obtains employment at more than £300 per annum, nor will he materially increase this for many years unless he has capital. This position is now aggravated

[14] See below para. 2.

[15] But it is not so long ago that I heard it seriously argued by a High Court Judge that this expense is an advantage since it discourages frivolous litigation. This argument is similar to that which would deny the working man a living wage lest he should spend it on drink.

[16] See note on p. 217.

by compulsory military service which adds another two years or so before the lawyer will be self-supporting in his chosen profession.

The result is that the legal profession is open only to those with fairly substantial private means—a class rapidly diminishing in numbers—and to the very occasional genius who has the brains to win and the courage to rely on scholarships and prizes to maintain him until he can maintain himself. It is difficult to believe that a State pledged to a policy of equality of opportunity will permit this to continue for long, even if the profession finds it possible to recruit itself on these terms.

3. Legal Education and Training are badly organised.

Legal education in this country is undertaken by three different types of organisation, the Universities, the Council of Legal Education (for the Bar), and the Law Schools of the Law Society and provincial Law Societies (for Solicitors).[17] Within this framework one would expect that the Universities' courses and examinations would be directed towards an academic background of the theory and general principles of the law, whereas those of the professional bodies would be essentially practical.

This, however, is by no means wholly true. In fact, the Universities alone provide a thorough legal training and the

[16] *Minimum* out-of-pocket expenses are:—

Barrister	£	s.	d.
Admission Fees	21	1	0
Stamp Duty	25	0	0
Lecture Fee	12	12	0
Examination Fees	4	14	6
Commons	13	10	0
Bar Dues	12	0	0
Call Fee	50	0	0
Stamp Duty	50	2	6
Reading in Chambers ..	105	0	0
Books and Miscellaneous (say)	30	0	0
Total	£324	0	0

Solicitor	£	s.	d.
Premium on Articles (say)	262	10	0
Stamp Duty on Articles ..	80	0	0
Law Society's School ..	52	10	0
Examination Fees	16	0	0
Admission Certificate, Fees	5	0	0
Stamp Duty	25	0	0
Practising Certificate ..	5	10	0
Books and Miscellaneous (say)	30	0	0
Total	£476	10	0

Note, that a large portion of this expense is due to stamp duties which are a unique imposition on our profession. The premium of 250 guineas for the Solicitor's Articles has been taken as a fair average.

[17] I ignore Law Coaches (though most students do not), except to say that while a few run genuinely educational establishments, the majority merely 'cram' for the professional examinations and are at the best a necessary evil while the present system remains.

courses of the professional bodies are perfunctory[18] and in many circumstances merely optional. As regards the examinations, there is much duplication. The Bar examinations and those of the Universities are virtually identical in scope and difficulty, and while the Solicitors Final is admittedly different (its questions are severely practical but it is not a practical examination but merely a test of memory—which is the last thing a lawyer should be taught to rely on), the Honours examination (which is optional[19]) is again virtually identical with the Universities Finals and the examiners are in fact the Cambridge Law School.

The result is that the Universities have fallen between two stools, since, in addition to trying to provide the general background which is their proper task, they also endeavour to teach the various subjects required for the professional examinations. Thus in their curricula one finds such incongruous bed-fellows as Roman Law and Conveyancing,[20] Jurisprudence and Evidence, the History of Law and Company Law, etc. And the student leaves with an incomplete knowledge of principles and a theoretical knowledge of practice.

As regards practical training, the position is equally unsatisfactory. The solicitor has to serve a long (too long) apprenticeship in an office before he can qualify, but a barrister can do so without any practical experience at all. Most do in fact spend a period in chambers as pupils but frequently not until after they have qualified. And only a very small number spend any time in a solicitor's office, so that they have no idea of the day-to-day problems of legal practice from which they remain sterilised throughout their careers.

C. REFORMS ALREADY IN PROGRESS

Some measure of reform of the first of these basic faults (expense to the public) has already taken place as a result of the Poor Persons Procedure, Legal Aid in Criminal Cases, the Services' Divorce Department, Services' Legal Advice Sections, and Poor Man's Lawyers. These, however, scarcely

[18] In fairness to the Law Society it should be said that they have recently introduced sweeping changes in their School and tuition will in future be by full-time teachers. For reasons given below (p. 225) this is not regarded as an unmixed blessing.

[19] Hence, to qualify as a solicitor one has to memorise a wide range of detail but need never acquire any knowledge of basic principles!

[20] If they swallow this essentially practical subject it is difficult to see why they should boggle at Divorce Law—but apparently they do.

touch the fringe of the problem, particularly as the financial limits within which the Poor Persons Procedure can operate are utterly absurd under present conditions [21] and when it is brought into operation it is deplorably dilatory. Moreover, the first three palliatives deal only with aid in litigation, and legal advice and other aid short of representation in Court are left (in the case of civilians) to Poor Man's Lawyers who do good work on a purely voluntary basis but who lack the facilities and organisation to give the assistance that is needed. They too are supposed to aid only those who qualify as 'poor persons' and generally profess merely to give advice, although many of them in fact write letters and take other action which is essential if genuine assistance is to be afforded.[22]

These reforms will be carried a considerable step further when the recommendations of the Rushcliffe Committee [23] are implemented. It is not proposed to deal with these recommendations in detail as it is assumed that the profession is familiar with them.[24] Their result will be an organised system of legal aid for the needy having the following immense advantages over the present system:—

1. Provision will be made for legal aid short of litigation.

2. The present rigid financial limits will be done away with in favour of a graduated system under which the very poor will pay nothing and those who can afford to contribute will do so according to their ability, the decision depending on a means test carried out by the Assistance Board.

3. Although the scheme remains under the control of the Law Society (responsible to the Lord Chancellor) the bulk of the cost of running it will be removed from the legal profession to the State, the solicitors and barristers concerned being remunerated to the extent of 85 per cent. of their normal charges.

These improvements are considerable but are clearly not the last word on the subject. On the contrary the scheme is

[21] Income not exceeding £2 per week and capital not exceeding £50 (or double these figures in special circumstances). With the present scales of wages and cost of living this excludes all but the very poorest.

[22] Certain bodies organising Poor Man's Lawyers (*e.g.*, the Bentham Committee) also provide additional assistance in a necessarily limited number of cases. The present position over the whole field is surveyed in the Rushcliffe Committee's Report (*infra*), and in more detail in Cohn & Egerton *Legal Aid for the Poor*.

[23] Cmd. 6641/45.

[24] They are dealt with in a learned note at 9 MOD.L.REV., pp. 58 *et seq.*, and in Cohn & Egerton, *op. cit.*, ch. 5.

very definitely only a half measure. Its principal disadvantages are:—

1. It preserves the present distinction between legal assistance for the moneyed classes and legal aid for the poor.[25]

2. It still remains optional for solicitors and barristers to enter the scheme and many of the best-known and busiest are unlikely to do so.

3. It therefore does not wholly remove the reproach that there is 'one law for the rich and another for the poor'. In fact, the new scheme still smacks of charity and has many of the worst features of the present medical 'panel' system that the National Health Service Bill seeks to eradicate.

4. All means tests are understandably disliked (and are anachronisms under a Socialist regime). The means test suggested in this case is a highly complicated one and is to be carried out by the Assistance Board. Not only is it likely to be extremely unpopular but it is bound to add considerably to the delay and this will be particularly regrettable in cases where the aid required falls short of representation in litigation. The Report recommends that legal aid sections shall give *advice* without means tests, the solicitor concerned receiving 7s. 6d. of which the client (where possible) will provide 2s. 6d. But if he requires additional assistance in correspondence or negotiations which cannot fairly be considered as covered by the 7s. 6d., he will have to obtain a legal aid certificate and be subjected to a means test. From my own experience as a Poor Man's Lawyer I should say that such additional assistance will be required in about 30 per cent. of applications, and if the delay of obtaining a certificate has to be incurred in all these cases the scheme will break down. The probability is, of course, that the advising solicitor will in most cases ignore the rule and do what is required without further payment, but this defeats one of the main objects of the scheme—to remove the financial burden from the profession to the State.[26]

D. FURTHER SHORT-TERM REFORMS

It is, therefore, considered that further reforms are inevitable. It is understood that the present Government have this question on their agenda although problems which

[25] Although it tries to make the distinction less obvious by recommending that the term 'poor person' be dropped in favour of 'assisted person'.

[26] For further criticisms, see Cohn & Egerton, *op. cit.*, ch. 5, para. 6.

they regard as more urgent make it unlikely that the question will be reached for two or three years. When it is reached, it seems probable that for the time being they will content themselves with certain short-term improvements and leave any sweeping changes until the working of the Rushcliffe Committee's Scheme has been fully tested.

In my view the most likely reforms are:—

(1) A merger of the two branches of the profession.

Much has recently been said and written on this topic and it is not proposed to traverse the whole ground anew. But it is thought that today few will be found prepared to argue that the division can be justified on grounds of either logic or convenience. A distinction between general practitioners and specialists is inevitable in any profession, but the present division of our profession is based on no such distinction. At a certain stage in litigation the solicitor has to call in (and the client has to pay) a barrister whether or not the services of a specialist are in fact required (and in a very large percentage of cases, including nearly all divorces, they are not). The barrister has to be briefed by the solicitor in an attempt (generally vain) to acquaint the former in a few days with the detailed knowledge of the case that the solicitor has laboriously acquired over months or even years. Conferences take place between the barrister and the solicitor and the former eventually argues the case in Court with the solicitor in attendance to prompt. The result is invariably greater expense, generally increased delay, and rarely greater efficiency.

I should not have thought that the main objection (expense) required further argument had it not been recently denied by a learned contributor to the *Solicitor's Journal*,[27] on the ground, as I understand him, that even in a merged profession the lawyer arguing the case would still need to have a brief and to be attended in Court. But even if this is true, he would not have to learn his brief from scratch (as a barrister is paid to do) nor would there be the numerous conferences between barrister and solicitor for which both are paid at present. Nor, it is suggested, would the method of remuneration be based on quite the same lavish principles as are the fees of a barrister (and his clerk) at present. Finally, there would not be the arbitrary and expensive rules of etiquette regarding the approach to a leader through a

[27] 90 S.J. (1946), pp. 215 and 319.

junior and the fixed proportion (two thirds) which by convention the remuneration of the latter must bear to that of the former. But the proof of the pudding is in the eating; despite the fact that briefs in the county court are marked with the minimum and that conferences are largely dispensed with, it is more costly when a barrister is engaged than when the solicitor argues the case himself.

Apart from the primary function of arguing in Court, barristers of course also act in an advisory capacity. In so far as they are genuinely used as specialists this is unobjectionable. But in far too many cases counsel's opinion is merely taken because the solicitor wants to shelve his own responsibility or because he is too busy to go thoroughly into the matter himself; this is all very fine, but why should the unfortunate client pay?

One of the main causes of expense (and to a lesser extent of delay) could therefore be swept away by merging the two branches. Apart from this main advantage, such a step would be beneficial to the profession itself. At present nearly every solicitor is overworked; on the other hand some 80 per cent. of the Bar have little or nothing to do whereas the remaining 20 per cent. are earning inflated fees for work which they are too busy to do properly. The merger would, therefore, enable a more economical use to be made of the available trained manpower. It would also enable a more economical use to be made of the various law libraries and would remove various irritating and pointless rules of etiquette governing the relations between the two branches. Finally, it would immensely strengthen the position of the profession by enabling it to speak with a united voice.

For these reasons it is believed that a merger is the obvious method of minimising expense,[28] which will presum-

[28] This article merely deals with methods of avoiding expense by reforms in the organisation of the profession. There are, of course, many other reforms which would assist in this direction. Of these one that seems obvious and long overdue is to permit reference of hypothetical questions to the House of Lords by the Attorney-General. A recent example of the need for this is furnished by *Berkeley* v. *Berkeley*, [1946] 2 All E.R. 154, in which the H.L. overruled a decision of the C.A. which had stood since 1942 and on the basis of which thousands of estates had been administered. The question turned solely on an ambiguity in an inefficiently drafted statute, and it is scandalous that the resolution of such an ambiguity should be dependent on the chance of its being litigated and that the individual litigant should have to bear the grave expense of resolving it. The traditional objections of the Bench to answering hypothetical questions do not carry conviction; the practice is recognised by many of the Dominions and if the Judicial Com-

ably be the main object of any reforms. It is also the reform most likely to commend itself to the majority [29] of the profession. It is thought therefore that the merger (inevitable sooner or later) may well commend itself to the present Government as an immediate and practical step. Any objection that the divided profession is an essential element of the common law system is sufficiently disproved by the U.S.A. and many of the dominions which have found no difficulty in discarding it and shown no desire to readopt it.

Admittedly, a merger cannot be effected by a stroke of the pen. As regards future entrants to the profession no difficulty need arise; the Law Society and the Bar Council would presumably be amalgamated to form a united Law Council which would control entry, those who qualified having access to the lay client and a right of audience in all Courts. But the absorption of the present members will present problems, particularly so far as the Bar [30] is concerned since barristers are unaccustomed to dealing direct with the lay client and would be initially ill-equipped were they so ill-advised as to set up in general practice on their own. These difficulties should not be serious, however, since the number of practising barristers is comparatively very small; many of them would no doubt continue to practise as specialists and consultants and the rest could well be absorbed with the larger firms of solicitors (or 'law firms' as they will then have become).

2. A reform of legal apprenticeship and education.

It has already been suggested that the present system suffers from the basic faults that apprenticeship is too long and too costly, and that legal education is wastefully organised. A merger of the two branches will greatly facilitate reform under these heads also, and will enable a uniform system of practical training to be operated by the new Law Council and a proper division of responsibility

mittee find it possible to answer hypothetical questions it is difficult to see why the same individuals sitting as the House of Lords should find it impossible to do so.

[29] But the minority (virtually limited to part of the 'fashionable' 20 per cent. of the Bar and a few to whom tradition is more precious than public convenience) is admittedly powerful.

[30] The converse case gives less difficulty since most firms of solicitors already undertake some advocacy and where they do not there will be nothing to stop them from employing another firm on an agency basis, or, if the case merits it, from engaging a specialist advocate.

to be worked out between it and the Universities. I think that the new arrangements will be somewhat on the following lines:—

(1) All trainees before their practical apprenticeship will be required to take a three-year course at a University [31] in the general principles of the law. I suggest that the following subjects [32] should be compulsory: History of English Law, Jurisprudence and the Theory of Law, the English Legal System, Constitutional Law, the General Principles of Contract, Tort, and Criminal Law and of Equity, Private and Public International Law and (for comparison) the general outline of one *living* foreign legal system (preferably one based on Roman Law, *e.g.*, Scots Law). This last subject would take the place of Roman Law which I do not consider justified as a compulsory subject. The omission of compulsory Roman Law would I hope finally kill the heresy that a knowledge of Latin is essential for a lawyer. In fact the few catch phrases that he needs to know he could learn in half-an-hour, and what is more he could learn to pronounce them as they are pronounced in legal practice; whatever justification there may have been for the Latin fetish was destroyed when the 'reformed' pronunciation was introduced.[33]

(2) At the end of this course the trainee will be articled [34] to a law firm for one year,[35] but during this year he will be paid a minimum salary of, say, £250 p. a. and will *not* pay any premium on his articles. The present system whereby the clerk pays his principal is an anachronism. Even today the clerk is a useful asset to his principal during the later years of his articles, and after acquiring the general background provided by the University course he would be well worth

[31] I assume that by this time the State's educational system will ensure that entry to a university by suitable candidates is not debarred merely on the ground of expense.

[32] There is also much to be said for the inclusion of certain non-legal subjects (*e.g.*, general sociology and philosophy).

[33] At present we have the absurdity of special courses of 'Latin for Lawyers' in which the student is taught in the reformed pronunciation solely in order to qualify him for a profession in which he will have to take care never to use that pronunciation!

And see further *R.* v. *Venables*, Herbert, *Uncommon Law*, p. 360.

[34] For convenience I have used the nomenclature at present applicable to the solicitors' branch.

[35] In view of the fact that he will be receiving a salary there is no particular objection to a longer period if one year is thought to be too short. Personally I consider it adequate provided that time off to read for examinations is not given.

£250. To obviate any difficulty in obtaining articles[36] the Law Council might have power to compel each practising lawyer to take one articled clerk at the minimum salary.

(3) During this year he will take an evening or part-time practical course at a law school run by the Law Council where the teachers will be practising lawyers.[37] This course will cover such subjects as Procedure and Practice, Conveyancing, Probate, Divorce, Evidence, and Company and Commercial Law with various optional subjects (such as Industrial Law, Local Government Law and Administrative Law) dependent on the type of practice envisaged.

(4) At the end of the year he will be required to pass a qualifying examination. At least part of this should take the form of problems of a type met with in practice on which the candidate (who would be given the run of a law library) would be required to produce a written opinion, for this (not a memory test) is the true test of practical ability.

The system envisaged will have the advantages of much reducing the length of time before the student starts to earn his living, of diminishing the expense, and of giving all lawyers an all-round training embracing a general background of theory, and tuition and experience in practice. It should also have the ancillary advantage of doing much to heal the rift between the academic and the practising sides of the profession.[38] In the U.S.A. the relationship between the two branches is much healthier and it is not uncommon for a lawyer to move direct from a Chair to the Bench or *vice versa*. In this country this is unheard of, and the practitioners' suspicion of the teaching side almost passes belief.[39] If every practitioner had had an initial academic training this suspicion might die.

E. LONG-TERM REORGANISATION

The reforms contemplated above, coupled with those recommended by the Rushcliffe Committee, will undoubtedly

[36] There would be no difficulty. He would still be the cheapest and not the least useful type of clerk.

[37] I regard this as important, and it is for this reason that I doubt whether the Law Society's recent introduction of full-time teachers at their Law School is a wise move (*ante*, p. 218).

[38] This has recently been deplored by Professor Fyzee: 'The Teaching of Law in Indian Universities': the Bombay Law College Mag., 1946.

[39] As an example: In connection with the award of a Law Society's Scholarship I had to pass the scrutiny of a sub-committee of the Law Society's Council. At this time I was teaching law at a university and the sub-com-

go some considerable way to meet the demand for a more up-to-date organisation. But it would be wishful thinking to pretend that they alone will meet the demands of the State of the future. It can hardly be doubted that a National Legal Service available to all will be regarded as an essential element of Social Security second only in importance to a National Medical Service which is now being established and to which all political parties are pledged. This is, indeed, only a logical development of the principle accepted by the Rushcliffe Committee that 'legal aid should be available in all Courts and in such a manner as will enable persons in need to have access to the professional help they require'.[40]

It should be stressed at once, however, that this does *not* mean that all lawyers will become civil servants, any more than the National Health Service means that medical practitioners will become civil servants. Of course, an increasing number of lawyers are employed by Government departments and many more will in the future be employed by the Crown or as *quasi*-civil servants by the corporations and boards established to operate the nationalised industries. But there are the strongest reasons for retaining the independence of the legal profession and the greater the powers of bureaucracy the stronger these reasons become. Happily this seems to be well appreciated by the public and by politicians. The Rushcliffe Committee reported that there was almost unanimity among witnesses that any scheme they evolved should be run by the legal profession itself and not by the State or local authorities, and it will perhaps best reassure my colleagues if I quote from the memorandum submitted by the Labour Party[41]:

> There are obvious objections to the State itself establishing and maintaining legal advice bureaux. Not the least of these objections is that the State itself is directly or indirectly affected by many of the claims upon which such bureaux would have to advise. Nor, in the opinion of the Labour Party, is it desirable that local authorities should be entrusted with the duty of establishing and maintaining legal advice bureaux. . . . Differences, political or otherwise, might well arise were a local authority to be held responsible, directly or indirectly,

mittee were openly reluctant to award the scholarship to one tainted by academic contacts. 'We are giving you this scholarship', they said, 'as a lawyer and *not* as a don; be a good solicitor Mr. Gower, be a good *solicitor*.'

[40] Cmd. 6641, p. 23.

[41] *Ibid.*, p. 24.

for the advice given on any particular matter. Moreover, it has to be borne in mind that many local authorities, particularly those concerned with passenger transport undertakings, are themselves frequently parties to litigation.

These arguments apply *a fortiori* to any National Legal Service. But they do not necessarily lead to the conclusion adopted by the Committee that the operation of the scheme should rest solely with the profession.[42] The legal profession and a legal service exist for the benefit of the public (and not *vice versa*) and there is every reason for allowing the public (as users) to have a voice in the running of the service.[43] Not the least of these reasons is that it would help to restore the waning confidence of the public in the profession if they were brought into closer contact with it and had a better idea of its working than they are able to obtain from the Press which is naturally mainly interested in its seamy side.[44]

The Rushcliffe Committee's Scheme will afford a base on which an extended National Legal Service can be built and the National Health Service Bill gives a pointer as to the general lines which such a Service is likely to take. But there are differences between Medicine and Law of which account has to be taken. The chief of these differences arises from the complications caused to a Legal Service (but not to a Health Service) by the position of corporations. An artificial person cannot be ill and never requires medical attention; on the other hand as a creature of the law it needs legal advice at its birth, at frequent intervals throughout its life and at its final dissolution. If the principle is recognised that everyone is entitled to legal aid without payment, is this to extend to corporations? Obviously this would not be practicable under present conditions; such concerns as the banks, insurance companies, I. C. I. and Lever Bros. would immediately dismiss their legal departments and have their work done at the taxpayers' expense. But it has been assumed that the present conditions will have altered radically and that many of these large institutions will have been nationalised. As regards such private corporations as remain, it may be argued that if, as seems inevitable, the State

[42] See on this point the criticisms of the Report in IX *Cambridge Law Review*, p. 261.

[43] As is being done in the case of the National Health Service.

[44] One defaulting solicitor and a sensational divorce are news. Ten thousand honest solicitors and a reconciliation are not.

retains the closest control over their formation and activities,[45] there is no logical reason why those that are permitted to exist as being in the public interest should be denied the right to legal advice on the same terms as natural persons. The answer to this question must, however, depend on the circumstances existing at the time when a National Legal Service is introduced and it may well be that exceptions will have to be introduced in the case of corporations possibly amounting to their total exclusion from the Scheme.

Another important difference between medical and legal aid is that whereas one person only has one doctor who necessarily resides in the same neighbourhood, this need not be so in the case of client and lawyer. Many people (once again this particularly applies to corporations such as banks, insurance companies, property companies and building societies) employ several different firms of lawyers, and a man living in Northumberland may have as his lawyers a firm in London.

Bearing these factors in mind I envisage that the National Legal Service of the future will be organised on the following lines :—

1. The Service will be controlled by a Central Advisory Council responsible to the Lord Chancellor (or the Minister of Justice, if we have one by this time). This Council will not be formed exclusively of members of the legal profession but partly of lawyers and partly of representatives of outside interests (the T.U.C., commerce, transport, the Church, banking, insurance, building societies, etc). In all probability half the members will be nominated by the Law Council and the remainder by the Government.

2. The Central Council will act through Area Committees (cf. the Executive Councils of the National Health Service) similarly constituted but containing representatives of the local authorities among the non-legal members. Area Committees will already be in existence as a result of the Rushcliffe Committee's Scheme and all that will be necessary will be for them to be expanded to meet their increased responsibilities and to incorporate outside interests.

3. The Area Committees will maintain lists of lawyers practising in their areas who wish to participate in the

[45] Borrowing (Control of Guarantees) Act, 1946.

Scheme.[46] As at present lawyers will be able to practice either alone or in partnership and in the latter event the partnership will appear on the lists in the firm's name.

4. All persons[47] will be entitled to choose their own lawyers either from the list of the area in which they themselves reside or from any other area list. Such persons as wish to take advantage of the Scheme but who have not chosen a lawyer or have been refused by the lawyer of their choice, will have a lawyer allocated to them by the Area Committee from one of the lawyers on their list. Each lawyer will thus have a panel of those he has accepted as his clients and as regards these the present relationship of lawyer and client will prevail except that the lawyer's remuneration will come from public funds and not directly from the client.

5. The lawyer will be permitted to take such legal action on behalf of his client as he thinks necessary, without any outside control or, of course, any means test. I do not think that it need be feared that this will encourage frivolous resort to legal advice[48]; it is a fact, not perhaps generally recognised by lawyers themselves, that the average person regards a visit to his lawyer with about as much distaste as a visit to his dentist. No doubt we shall continue to be plagued by the old women (of both sexes) who want to alter their wills every few weeks, but these are certainly not more common than the imaginary invalids, known to every medical practitioner, whose existence was not considered as an obstacle to a National Health Service.

But this complete freedom of action on the part of the lawyer must be subject to two limitations:

(a) 'Legal' action only will be permissible, *i.e.*, such action as requires a lawyer. At present some people employ lawyers for such tasks as filling up their income tax returns; if they want this done they will obviously have to pay for it and not expect it to be undertaken at the public expense.

(b) Before actual litigation is commenced, an application will have to be made to the Area Committee which will have to be satisfied that there is a *prima facie* case. It seems

[46] As in the case of the Health Service, it is assumed that lawyers will (at any rate in the first instance) be allowed to continue in practice outside the scheme if they wish.

[47] The possible need for an exception in the case of corporations has already been considered.

[48] If the lawyer is not remunerated on the basis of work done (see below, p. 230), he will of course be in a strong position to discourage frivolous applications.

essential that this control should be exercised before parties are permitted to litigate at the public expense and that this will be necessary whether the party wishes to commence or defend an action. In effect, therefore, the procedure under the Rushcliffe Committee's Scheme will be continued except that the Committee will merely be concerned with whether there is a *prima facie* case and not with the means of the applicant. In the case of criminal proceedings legal aid certificates would no doubt continue to be granted by the Court concerned whenever it appeared desirable in the interests of justice but apart from this every defendant who had elected to take advantage of the Service would automatically be entitled to advice from his lawyer who would ensure that he was aware of his rights [49] and that an application for a certificate was made if the circumstances warranted it.

6. We now come to perhaps the most controversial point: On what basis is the lawyer to be remunerated?

There are four feasible methods:—

(a) For work done;
(b) By capitation fees;
(c) By salary; or
(d) By a combination of the above methods.

(a) The first of these possibilities has obvious attractions and is no doubt the solution which, at first glance, would find most favour with the profession itself. Solicitors are at present remunerated on this basis [50] and their charges are controlled by statute, so that this method would virtually be a continuation of the present practice. Moreover, it would leave the incentive to work undiminished and give the greatest rewards to those who did the most. But this appearance of simplicity is largely illusory. If the State is going to foot the bill, the State will obviously insist on taxing the bill—it is too much to hope that it would be prepared to pay on the lawyer's *ipse dixit* without inquiry. At present taxation, or indeed preparation of a detailed bill of costs, is the rare exception because it is to the solicitor's interests to be scrupulously fair—or even generous—to his clients. But if the State and not the client was paying, could *every* lawyer

[49] At present it is often only the old lag who knows of his rights and makes sure that he obtains them.

[50] Not entirely, because where 'scale fees' are appropriate the remuneration is proportioned to the value of the subject matter and not to the amount of work.

be trusted never to take, and charge for, an unnecessary step, and always to charge the minimum to which he is definitely entitled and never the maximum to which he thinks he may be entitled? I fear that the Legislature is unlikely to think so. And so taxation would become the inevitable rule instead of the rare exception and every lawyer's office would have a vast staff doing nothing but preparing detailed bills and taxing them before the Taxing Masters (themselves multiplied to many times their present numbers). Imagination boggles at the thought.

If, on the other hand, one of the other solutions is adopted all the dreary routine of preparing bills can be scrapped—and with it cost clerks and Taxing Masters who can instead turn their talents to more useful activities.[51]

(b) Payment by salary is the simplest of all solutions. The objection that it would destroy the independence of the legal profession and turn its members into slavish supporters of bureaucracy, I regard as nonsense. After all, Judges and stipendiaries are at present paid by salary and their independence is proverbial; if this objection were sound, impartiality and independence would only be found among the unpaid magistracy which is more than even its most extreme supporters have ever argued.

No, payment by salary of itself clearly need not destroy independence. Neither does it follow that adoption of this principle would be to the financial detriment of the profession. It has already been pointed out that the financial rewards reaped by most lawyers are inadequate and too long delayed, and if a salary scale were adopted similar to that recommended for the medical profession by the Spens' Report[52] the average practitioner would be better off and would receive a fair reward much sooner.

The real objection to payment by salary alone is that given by the Spens' Committee itself[53]:—

> We are satisfied that there is a far greater diversity of ability and effort among general practitioners than admits of remuneration by some single scale applicable to all. If the recruitment and status of the profession are to be maintained men must be able to feel that more

[51] It is appalling how many potentially useful citizens are at present employed on nothing more socially productive than working out how much lawyers shall be paid.
[52] Cmd. 6810/46.
[53] *Ibid.*, p. 8.

> than ordinary ability and effort received an adequate reward. On the other hand, a reward which would be appropriate when these exist would be extravagant when they do not. In consequence, we are clear that any satisfactory system of remuneration must involve differentiation dependent on ability and effort. Further, if the profession is to be satisfied and recruitment maintained, it is essential that the method of differentiation should command confidence. We are satisfied by the evidence put before us that no existing degree or qualification can wisely be made the basis of additional payment, largely because many of the qualities which make the best general practitioner are, in fact, unexaminable.

These considerations apply equally to the legal profession. And there is the further objection that if every lawyer received a salary irrespective of the work he did, some would find irresistible the temptation to do as little as possible.

It is therefore considered that this solution by itself is unlikely to be adopted, at any rate in the first instance. It will be remembered that it was rejected, despite considerable pressure, in the case of the National Health Service, on the ground that the medical profession was not 'ripe for it'.[54] In this respect the legal profession seems to me to be even less ripe.

(c) It seems likely, therefore, that *per capita* payments will form part of the basis of remuneration. In fact, the probability is that the same solution will be adopted as that chosen for the Health Service, namely, a combination of a fixed part salary [55] and capitation fees. The salary is the only method of ensuring adequate remuneration to newly-qualified lawyers, while capitation fees are the simplest method of rewarding ability and effort.

There are, of course, objections to the principle of capitation fees in the case of legal aid; on the face of it it is anomalous that the reward for acting for a prominent business man with many irons in the fire should be the same as that for acting for an old age pensioner who may never require any advice at all. But to some extent the same objections apply in the case of the Health Service and the answer is that what we lose on the swings we shall hope to gain on the roundabouts—a rule which already applies in the case of 'scale fees'.

[54] *Hansard*, April 30, 1946, p. 55.
[55] Varying with age or length of experience and, perhaps, locality.

It seems that adoption of this method need result in no very startling changes in legal practice. It will still be possible to work in partnership, for the advantages of so doing (in saving overheads and promoting a certain degree of specialisation) will be just as great as at present. And there is no reason why the partners should not enter into any agreement that they wish regarding the shares in which they (and their admitted clerks) are to participate in the joint capitation fees.

7. This Scheme will only apply to what may be termed 'general practitioners'. Specialists will remain outside the Service except that the general practitioner will be entitled to call them in when the circumstances warrant it and in such cases the Area Committee will have to approve his action and authorise payment of the fee from public funds. I can see no objection to a lawyer who is participating in the Scheme also practising as a specialist provided that he does not act as such for the clients of himself or his firm.

8. The Scheme which has been envisaged follows closely that to be adopted for the National Health Service and no doubt this precedent will be followed (in the light of experience of its working) in other more detailed matters. For example, it may well be that Legal Centres will be encouraged on the same lines as Health Centres. Such Legal Centres will to some extent have grown up as a result of the Rushcliffe Committee's recommendations, and an extension of them would result in a valuable saving of library facilities, office accommodation, and clerical assistance. Similarly, the sale of practices will no doubt be forbidden and the Area Committees will control the opening of new practices.

These, however, are matters of detail which it would be inappropriate to deal with in an article which purposes to do no more than forecast the likely lines of general development.

F. PROFESSIONAL REACTIONS

It was said at the beginning that the legal profession would have to change whether it liked it or not. What in fact are its reactions likely to be to the suggested programme?

In my view the merger of the two branches would have the support of a large majority of each, although, as already

admitted, the dissenting minority would comprise the most powerful elements.

The reorganisation of legal apprenticeship and education would probably meet with little opposition in principle but agreement on details might be difficult to obtain.

The proposal of a National Legal Service would undoubtedly meet with the most bitter opposition from the bulk of the profession, although it would receive support from many of the younger members who recognise its necessity even although they do not necessarily welcome it with enthusiasm.

It seems probable that any changes will have to be imposed from without instead of springing from within the profession itself. For what it is worth, I have given my opinion on what these changes will be. I do not pretend that I am necessarily right; least of all do I pretend that many of my forecasts will be popular with my colleagues: indeed, some of them are equally unpalatable to me. But on the whole I do not think that we need be daunted by this picture of the future in which our position would at least be preferable to that in a completely bureaucratised legal system—which in the last resort seems the only likely alternative.

L. C. B. GOWER.

COMPANY LAW REFORM

A REVIEW OF THE REPORT OF THE COMMITTEE ON COMPANY LAW AMENDMENT

COMPANY law is in effect the sum total of those legal principles which regulate the large-scale organisation of industrial and business management and finance in most branches of economic life. The more popular the use of the joint stock company in business, the larger is the claim of the law to submit the relationship between manager and investor to rules and regulations guaranteed by legal sanctions. One need not endorse the thesis of the 'managerial revolution' and can nevertheless be aware of the inexorable forces which, in the course of the last fifty years or so, have resulted in a considerable ascendancy of the managerial over the financial power in economic life. Business organisation is in a constant state of flux, and the law cannot hope to keep abreast of developments if it ascribes to its own provisions the quality of immutability. Other branches of commercial law—the law of sale of goods, the law of carriage, even the law of insurance—may content themselves with the setting up of a stable framework and leave the function of adaptation to the contractual practice of the business community itself. Company law cannot afford to do this. As soon as the privileges of corporate personality and limited liability have been made available to the business world, as soon as the handling of vast funds contributed by large and small investors has been entrusted to managers who are not subject to the law of loan and debt, the law must be on the alert to protect against abuses the investor, the outside creditor, and the public itself. Company law can never reach a stage of 'finality', it is in need of constant revision and, as was pointed out in a leading article in the *Times*, July 18, 1945, 'experience shows that these changes [in commercial and financial practice] have in the past demanded a major recasting of the law not less than about once in fifteen years'.

I

The 'major recasting' which the Cohen Committee had to undertake did not amount to a codification of company law. The Committee's terms of reference made it clear that its

duty was to consider amendments in the Companies Act, 1929. That Act is a consolidating, not a codifying statute, and, although the Committee do recommend (No. 10) the passing of a new consolidating Act, they do not suggest that the codification of company law as a whole is desirable. Even if all the recommendations of the Report were carried into effect, some of the paramount principles of company law, especially those protecting the company's share capital (*Trevor* v. *Whitworth* (1887), 12 App.Cas. 409; *Ooregum Gold Mining Co.* v. *Roper*, [1892] A.C. 125), would remain outside the purview of statute law. On the whole, the Report touches 'company case law' only at its fringes, *e.g.*, in connection with the certification of transfers (No. 139) and with the financing of transactions in the company's own shares (No. 170). There is, however, embodied in the Report one recommendation designed to change a basic principle which has emanated from the Courts and not from Parliament. The *ultra vires* rule, which has long outlived whatever usefulness it may have had in the past, is to disappear in the limbo of legal history. *Ashbury Railway Carriage Co.* v. *Riche* (1875), L.R. 7 H.L. 671, is to die an unlamented death, and will drag down into the abyss a whole volume of casuistry. 'A stroke of the pen of the legislator and libraries become wastepaper.' Practitioners, students, and, if it is permitted to say so, teachers of the law will join in a chorus of praise for the recommendation (No. 12) that 'every company, whether incorporated before or after the passing of the new Companies Act, should, notwithstanding anything omitted from its memorandum of association, have as regards third parties the same powers as an individual'. The objects clause in the memorandum is to operate, like the articles of association, 'as a contract between the company and its shareholders as to the powers exercisable by its directors'. In other words: the distinction between acts *ultra vires* the company and acts outside the directors' authority will cease to exist, the objects clause will be subject to the rule in *Royal British Bank* v. *Turquand* (1857), 6 E. & B. 327, what was a matter of capacity will be a matter of agency. The objects clause will be alterable—like the articles—by special resolution, without the sanction of the Court.

One is tempted to ask why the Committee did not go one step further along the road of reform so as to suggest the abolition of the dichotomy of memorandum and articles.

They recommend (No. 29) that the memorandum is no longer to be included in the prospectus. There is no reason why in future the whole of a company's constitution should not be embodied in one document instead of two. It would have to be provided that certain provisions are compulsory (name, nationality, objects, capital, liability), that one of them (nationality) is unalterable, and others (name, capital, liability) can only be altered in certain forms and with certain consents of outside agencies. It is believed that the number of companies who have simply adopted Table A has always been small—private companies have, of course, never been able to do so—and no substantial additional burden would be imposed upon the original subscribers by this considerable and, it is submitted, useful simplification.

It was not within the Committee's terms of reference to discuss Industrial and Provident Societies, Statutory Companies, and whatever other business undertakings with corporate entity there may be. The Committee's criticism of the *ultra vires* rule applies to all of them—in the case of trade unions it was removed by the Trade Union Act, 1913—and it is worthy of consideration whether the clause in the new Bill should not be framed in terms sufficiently wide to cover them all. Some of the most useless and intractable disputes about *ultra vires* have in the past arisen in connection with railway companies. An extension of the inaugurated reform to corporate entities other than registered companies would not preclude a member from raising the question of an excess of authority in a Court of law (see, *e.g.*, *Cahill* v. *London Co-operative Society, Ltd.*, [1937] Ch. 265), but it would safeguard third parties.

The application of the principle to public corporations raises a separate issue. A comparison of section 3 of the London Passenger Transport Act, 1933, with section 1 of the Coal Industry Nationalisation Act, 1946, shows that no uniform pattern of legislation has so far been established: The powers of the London Passenger Transport Board are circumscribed in a manner similar to that used in the memoranda of registered companies, while a much wider discretion is vested in the National Coal Board. There is no reason why, even in the case of corporations of this kind, the validity of contracts with third parties should in any way be affected by the question whether the corporation has exceeded its powers, especially in view of the legal difficulties raised by

the divergencies between the margin of discretion left to the various bodies. It would, on the other hand, be hardly expedient to apply to public corporations the formula suggested by the Cohen Committee. In their case it is necessary to preserve the right of third parties to restrain an *excès de pouvoir* by means of the proper remedies, such as mandamus and injunction, available against the corporate entity itself. But the extent of its powers should not be tested within the framework of an action on a contract made by the corporation. Hence while the issue should cease to be one of 'capacity', it cannot be reduced to one merely affecting the authority of the executive organs. What can be left to an adjustment of interests between the corporation and its members where we are confronted with a corporate entity having members in the proper sense, becomes an issue of administrative law where the corporate entity device is used for the incorporation of a public interest. In this case the public duty of the corporation as such to keep *intra vires* should remain intact, but it should be a *lex minus quam perfecta* so as to protect innocent outsiders.

II

The Committee did not embark upon an investigation of the corporate entity principle as such and of its implications. *Salomon* v. *Salomon & Co., Ltd.*, [1897] A.C. 22, has, alas, survived many Companies Acts, and one is becoming resigned to its immortality. Section 275 of the present Act, which provides for the liability of directors, etc., in cases of proved fraud, is to be strengthened (No. 149), but proof of fraudulent intent would still remain the precondition for 'lifting the veil' under this provision.

Nevertheless, the Committee have, in some respects, boldly ignored the fiction of corporate personality. In a large number of instances a holding company and all its subsidiaries and sub-subsidiaries are in future to be treated as one unit and as if the subsidiaries were nothing but branches of the holding company. For this purpose the Committee have suggested a re-definition of a subsidiary company and the repeal of the present inadequate definition in section 127 of the Companies Act, 1929, (No. 118). The present definition suffers from two serious defects: it does not include sub-subsidiaries and it places too much emphasis on the ownership of shares in the subsidiary on the part of the parent company.

As the Report points out, the definition is too narrow and at the same time too wide. It is too wide because company A may hold the majority of the shares of company B without exercising any control over its management and business policy, *e.g.*, if the B shares held by A are preference capital without any voting rights or rights in the residue of profits. It is too narrow because there are many ways in which one company may control another without owning a single share. In future the control test is to be pushed into the foreground. The *Daimler* heresy of yesterday has become the orthodoxy of today. 'Control' is easy to describe and difficult to define, but defined it must be, and the law must get hold of a tangible criterion to which the question can be reduced. The Cohen Committee have taken the view that the 'power to appoint or remove or procure the appointment or removal of a majority of the directors' should be the test of 'control'. Whether or not this test will fulfil the purpose for which it has been formulated will depend on the interpretation of the term 'director' in the light of what is now section 380. According to this provision 'director' includes any person occupying the position of director by whatever name called. Will the Courts be prepared to hold that a person who has not been elected by the shareholders of the alleged subsidiary, but nevertheless controls its policy (while the so-called 'directors' are his tools), is a 'director' within the meaning of the definition? Or might it not be better, in order to give effect to the Committee's intentions, to re-cast the definition of a 'director' in section 380 and to say that 'director' includes any person who effectively determines the management or business policy of the company?

The Committee did not, however, see fit to apply the control test pure and simple. Power to appoint and remove directors does not, in the Committee's view, make a company a holding company, unless it is coupled with the direct or indirect beneficial ownership of at least one share in the alleged subsidiary or is exercisable through such ownership or through the ownership of shares in another company (this covers the case of the sub-subsidiary). It would appear that this additional criterion might frustrate the objects of the definition. Control over a company may be exercised through debentures or—see, *e.g.*, *Inland Revenue Commissioners* v. *Tring Investments, Ltd.*, [1939] 1 All E.R. 148—through an unqualified option to acquire shares. The ingenuity of

business men and their advisers will be put to the task of inventing other means of control. It is submitted that the additional criterion of beneficial ownership should be dropped.

On the other hand, it is surely right that a company should be regarded as a subsidiary (even in the absence of 'control') if more than half of its 'equity share capital' is beneficially vested in the holding company. This, the Committee suggests, should be a conclusive test of dependency. 'Equity share capital'—a new legal term—is not, of course, identical with 'ordinary share capital'. (Ordinary shares may be, and often are, limited as far as dividend rights are concerned, especially where there are founders' shares.) A share is an 'equity share' if it confers a 'right' to the whole or part of the residue of profits or (the 'or' is important!) of the proceeds of the assets in the event of liquidation.

Some space has been devoted to the analysis of this definition because the recommendations on holding and subsidiary companies are by far the most fundamental innovations suggested by the Report. This may well be the starting point of a new branch of the law, the law of 'interlinked concerns', the discipline which, in Germany, used to be known as *Konzernrecht*. So far this branch of the law has, in this country, only grown in the special field of revenue legislation. The Report proposes to attach most far-reaching consequences to the existence of company interdependence. In many cases it will be the real business unit of interlinked companies, and not the arbitrary legal unit of the single company which will be subjected to legal duties and liabilities.

Much the most important of these cases is the treatment of the business group as one entity for the purpose of formulating a balance sheet and profit and loss account. The Committee propose that a holding company and all its subsidiaries should, wherever practicable, publish a 'consolidated' balance sheet and profit and loss account (No. 119). These consolidated accounts would show the financial status of the group as a whole and ignore intra-group indebtedness and shareholdings (which are, in reality, not legal relationships at all, but accounting devices). Banks, discounting companies, and insurance companies would be exempted, and there are many other complex details into which we cannot enter. If the proposal is adopted, it may well have the desirable result of discouraging the growth of subsidiary legal entities without business reality.

III

The Committee refrained from expressing any view on the desirability or otherwise of the super-abundance of private companies. If they regarded it as an evil, they certainly did not think that they were able to suggest a remedy for it. They were faced with a 'demand that all private companies should be required to file their accounts' (No. 50) and thus, by repealing seven words in what is now section 110 (3) of the Companies Act, to deprive private companies of 'the most highly prized' of their privileges. Indeed, had the Committee acceded to this request, they might, without suppressing the private company, have given new life to the partnership as a legal institution and removed many of the worst abuses in business life. They were, however, anxious to protect the small family concern (No. 51) run in the form of a company, without examining the question whether it is desirable that small family concerns should be conducted behind the shield of limited liability. On the other hand, they desired to take away the privilege of secrecy of accounts from private companies other than the small family business, and in order to achieve this aim they subdivided private companies into two categories: 'exempt private companies' and 'non-exempt private companies' (No. 53). Broadly speaking, an 'exempt private company' would be a company none of whose shareholders is a body corporate (exceptions, *e.g.*, a trustee under a family settlement, apart) and all of whose shares 'are beneficially owned by the persons in whose names they are registered', and only such a company would retain the privilege of not filing their balance sheet and profit and loss account with the annual return. They themselves considered this criterion only as a lesser evil and recognised that 'some companies which cannot be described as small' would remain exempt under this definition.

This is one of the least satisfactory features of the Report. Is there a case for the retention of the secrecy of the accounts in the case of the family company and thus for the continuance of the widespread use of the private company? Why should a family concern which is in competition with partnerships and single traders and, for that reason, afraid of giving publicity to its accounts, not be compelled to choose between the privileges of secrecy and limited liability? The Committee themselves are in favour of publicity of

accounts and are not afraid that it may lead to small concerns being driven out of business by their larger rivals (No. 51). Their terms of reference precluded them from making a recommendation for the publicity of accounts of traders other than companies, and what they said, in effect, was: If we cannot have publicity of accounts for all traders, we must not recommend it for private companies either. To the present writer this is not a convincing argument.

But, if one conceded that the Committee have made out their case for the retention of secrecy, one may still wonder why the 'non-exempt' private company should be allowed to continue to exist as such.

Some of the minor privileges of private companies (*e.g.*, the right to have a director's partner as an auditor (No. 110), the exemption from the duty to furnish shareholders with balance sheets without request and free of charge (No. 54)) should, in the Committee's view, be removed, their exemption from the duty to appoint directory would be converted into the right of having one instead of—as in the case of the public company—two (No. 174). On the other hand, the private company would remain outside the scope of the provisions with regard to prospectuses and statements in lieu of prospectus, trading certificates, commencement of business, statutory meeting, statutory report, etc., and new privileges with regard to the election of directors (No. 130) and their retiring age (No. 131) would be conferred upon them.

There is no reason why non-exempt private companies should have these privileges, not even from the Committee's own point of view. In other words: it would be in accordance with the Committee's own intentions and in the interest of simplification and elegance of draftmanship to scrap the dichotomy of 'exempt' and 'non-exempt' private companies, and to re-define a private company by embodying the definition of an 'exempt company' in that of a private company in what is now section 26 of the Companies Act.

IV

The formation of a company is affected by the Cohen Recommendations only in one detail: the Registrar is to be empowered to refuse the registration of a company if the name chosen by the promoters is calculated to mislead, and the exercise of this power is to be subject to an appeal to the

Board of Trade (No. 16). Hitherto, under section 17 of the Act, the Registrar has been tied by a very narrow definition of what is 'misleading', and aggrieved parties have been compelled to bring a passing-off action in the Courts. In this case, few will quarrel with what amounts to a transfer of jurisdiction from the judiciary to the executive.

Far more important are the recommendations for the reform of the 'floating' procedure which follows the formation of the company, except in the case of private companies. The Committee have made a number of very significant proposals for the strengthening of the present law governing prospectuses.

One of these recommendations will have to be carefully noted by those interested in the development of the law of contract. Textbooks on this subject will, if the Cohen Recommendations are adopted, add a footnote to the statement that, in English law, a contractual offer is revocable until it is accepted. This will no longer apply to the contract of allotment. The Committee Report informs its readers that the 'stag' has his habitat not only in the wilds of Exmoor and the Scottish Highlands, but in the very heart of the City of London. There he has the unpleasant habit of subscribing to new issues of shares as a 'try-out', and then, often, of withdrawing his application before allotment with the result that frequently what first appeared as an over-subscription afterwards turns out to be the opposite. In order to hunt the 'stag' and bring him to book, the law must rid itself of doctrinal fetters, however venerable they may be. The Committee propose (No. 20) that applications for shares and debentures pursuant to a prospectus should be irrevocable for three days after the opening of the lists.

Another proposal on prospectuses (No. 28) establishes a link between the rigid machinery for the enforcement of statutory standards and the more flexible apparatus of the Stock Exchange Committee's 'permission to deal'. One of the general characteristics of the Cohen Report is the attempt to arrive at an allocation of functions between these two agencies (see *e.g.*, No. 89, No. 175): the Courts which enforce the provisions of the statute with the help of civil and criminal sanctions, and the Stock Exchange Committee which enforces additional standards by granting or refusing the permission to deal in a particular issue in the Stock Exchange. It is brought home to the readers of the Report that a study

of company 'law' without taking account of the Stock Exchange regulations is a futile undertaking, and that company law, like so many other legal disciplines, makes nonsense of the jurisprudential definition of law as something that can be enforced in a Court. The link between the two interlocking systems of standards is constituted by the following recommendations on prospectuses: if a company states in a prospectus that permission to deal has been, or will be, applied for, it is to make the application within two days after having issued the prospectus. If it fails to do so or if its application is refused within twenty-one days after the lists have been closed, the contracts of allotment are cancelled *ipso iure*, and all moneys received from the applicants must be repaid (they had to be kept in a separate account) by the company with a superadded personal liability of the directors. The filing of a statutory declaration that permission has been granted or applied for and has not been refused within those twenty-one days, is to be an additional condition precedent for the commencement of business.

Of the numerous recommendations which deal with the compulsory content of a prospectus the most notable is perhaps the suggestion to make a reality out of the disclosure of 'material contracts' by requiring their delivery to the Registrar (No. 31). But of even greater significance is the strengthening of the sanctions (both criminal and civil) for the enforcement of truthfulness and completeness of company prospectuses. The proposal (No. 36) to extend the civil liability for untrue statements to omissions of material information inaugurates the filling of a gap in the present Act which must have been obvious to every student of company law. It is arguable that the formulation suggested by the Committee is capable of improvement. It should be made clearer than the Committee have made it that every omission to state any of the matters set out in what is now the Fourth Schedule (in its improved form) is an omission of a 'material particular'.

From a practical point of view the shifting of the burden of proof with regard to *mens rea* in criminal proceedings for issuing false prospectuses (No. 41) and, with regard to experts' reports, in civil proceedings (No. 43), and the extension of civil liability to the experts themselves (No. 44) will be generally welcomed. The tenderness of the Committee to bankers, brokers, solicitors and accountants who allow

their names to appear in the document will not be generally understood, and the reasoning—or lack of it—in the paragraph (No. 46) of the Report which refuses to make them liable will hardly command universal approval.

V

The Committee do not seem to have cherished the illusion that, at this time of the day, anything like an effective control of the shareholders over the management of a big company can be re-established. The divorce between financial interest and power of management is a fact. It is a phenomenon observable all over Europe and in the United States, and it is useless for an Act of Parliament to stem the tide of an economic development which is inherent in the technical and organisational evolution of capitalist society. It is, therefore, satisfactory to see that the Cohen Committee does not purport to do more than to check some abuses so as to make shareholders' meetings and the election of directors a little more of a reality, and to make it a little easier for dissentient shareholders to organise an opposition. The period of notice for meetings is to be lengthened to twenty-one days in the case of the annual meeting and fourteen days in the case of other meetings (except, of course, if a special resolution is to be submitted, in which case it must always be twenty-one days) (No. 126), directors—except permanent directors of private companies—are always to be removable (subject to contractual compensation) by ordinary resolution, notwithstanding anything to the contrary in the articles, each new election is to be the subject of a separate resolution, unless the meeting decides without dissent for a global election (No. 130), and there is to be a retiring age for directors of public companies which, in the absence of a provision in the articles, is to be fixed at seventy (No. 131). Moreover, an attempt has been made to render it more difficult for the management to dominate the meeting through proxies, *e.g.*, by recommending that a member should always be entitled to appoint a non-member as his proxy, that members should be notified to this effect (No. 133), that proxies may speak as well as vote (No. 133), that proxy forms must be issued to *all* members or to none (see *Wilson* v. *L. M. S. Ry.*, [1940] Ch. 393) (No. 132), etc. Shareholders are to be given more generous facilities in organising an opposition by using the company's machinery for the circulation of draft

resolutions and statements before a meeting (No. 128), and they should always have the right to demand a poll (No. 136).

No one is likely to believe that these measures—beneficial though they may be—can be more than palliatives. As far as the organisation of the company is concerned, the path of reform lies in a different direction. Control over the management cannot be exercised by shareholders through the mechanism of a 'shareholders' democracy', and analogies taken from the constitutional law of a Parliamentary Democracy are singularly inept. The reality of control can only be found in the action of public opinion and in the organised supervision exercised by Government agencies. Hence the vital importance of those parts of the Report which deal with investigations by the Board of Trade and with the disclosure of the company's accounts.

The Committee have severely and convincingly criticised the existing provisions with regard to investigations by the Board of Trade (sections 135 and 136 of the present Act). They are, indeed, hopelessly inadequate, and, as the figures given in the Report show (No. 154), they have very largely remained a dead letter. The Committee take the view (No. 155) that the present law suffers from three main defects: It makes it too difficult—in many cases virtually impossible—to apply to the Board for an investigation (at least one-tenth of the share capital must be represented by the applicants in the case of an ordinary non-banking company), it imposes upon the applicants the burden of proving that they are not prompted by 'malicious motives', and it fails to empower the inspector to extend his investigation to subsidiaries. To remedy the first of these defects the Report proposes that 200 shareholders or shareholders representing one-tenth of the capital should have the right to apply for an investigation, and that the Board of Trade should have powers to act of its own motion if there is reasonable ground for suspecting fraud, misfeasance, breach of duty in the management, oppression of a minority, withholding of information, etc., and if the appointment of an inspector is in the public interest. It is also proposed that the burden of disproving malice should be abolished, and—this is perhaps the most important point—the hand of the inspector should be strengthened not only by enabling him to extend his investigation to subsidiaries and holding companies but also by empowering him to apply to the Court for an examination

on oath of anyone capable of giving relevant information (No. 156). Finally, the report of the inspector should be made available to all shareholders, and, if necessary, creditors, and the Board of Trade should be able to apply to the Court for a winding up and to bring proceedings in the name of the company for the recovery of money from persons involved in acts prejudicial to the company (No. 157). It is, indeed, a considerable step in the right direction that a company's affairs should be liable to investigation by a public body in the public interest of its own motion, and the Committee's recommendations must be welcomed by all those who believe that nothing short of administrative action can ultimately enforce compliance with the required standards.

It is curious to see how slowly the law adapts itself to the requirements of good accounting practice. The present law fails to impose any minimum standards with regard to the profit and loss account, but the Committee have made detailed recommendations to this effect (No. 103). A lawyer is hardly qualified to discuss the suggested definition of fixed and current assets (No. 99) and the provisions for the method of valuing the former (No. 100). From his point of view the most interesting proposal is that aiming at the dislosure of hidden reserves (No. 101). So far it has been the law that a company might always represent itself to its shareholders and to the public as poorer than it actually was—calculated modesty was allowed to prevail over truth. But there are weighty reasons why the law should cease to tolerate this practice. Not the least important reason is that consumers and workers are entitled to know the facts underlying the calculation of prices and wages. It remains to be seen whether the detailed recommendations made by the Committee will be sufficient to enable the law to force upon public companies a disclosure of the true value of their assets.

In connection with accounts it may also be noted that share premiums are, in future, to be treated as capital and that, except for the payment of bonus shares, the share premium account is not to be reduced without the sanction of the Court (No. 108).

It is proposed that only members of societies designated by the Board of Trade or individuals so designated should be able to act as company auditors (No. 110). While few will quarrel with the substance of this recommendation, the question may be asked whether it is not going to give to the

professional organisations of the accountants a formidable and potentially dangerous power over the livelihood of their members. Some public supervision of the exercise of their disciplinary right of expulsion may be required.

VI

There remains one—the most important—set of recommendations with reference to the relationship between management, shareholders and the public—those which concern the rights and duties of the directors themselves. The Cohen proposals are an improvement of the present law, but they do not go far enough, and it is here that the disinclination of the Committee to prescribe radical cures for obvious evils is most noticeable.

The problem of legal policy which the Committee set out to solve is one which arises wherever a person is exposed to a conflict between interest and duty. The decline in the powers of the shareholders' meeting has emphasised the magnitude of this problem in the case of the directors. The board of directors controls the company. English law has never known the institution of a permanent supervisory body charged with the function of checking the activities of the directors, nor does the experience made abroad with such supervisory bodies suggest that their introduction into the English system of company law would be desirable. Their tendency has usually been either themselves to assume the function of a directing body and to reduce the nominal directors to mere executive employees, or else to remain largely ineffective. It is probably true to say that, according to the original idea underlying English company legislation, the board of directors was not intended to be a managing body, but a body controlling the managers. As everybody knows, the boards are today usually composed of managing and non-managing directors, and the 'tendency to include in boards of directors men who hold managerial positions in the company' has, as the Committee point out (No. 89), been growing and is 'in itself by no means to be regretted'. However, this tendency aggravates the problem: *Quis custodiet ipsos custodes?*

The answer which English law has given to this question is well known: the remedy for the evils arising from a conflict between interest and duty is disclosure. The application of the equitable principles governing fiduciary relationships to

the liability of promoters has been one of the outstanding contributions of the Courts to the development of English company law (*Erlanger* v. *New Sombrero Phosphate Co.* (1878), 3 App.Cas. 1218; *Gluckstein* v. *Barnes*, [1900] A.C. 240). In the case of directors the rule, usually known as the rule in *Parker* v. *McKenna*, 10 Ch.App. 96, prohibits contracts between a director and the company, unless (as is usually done) they are permitted by the articles or approved by the shareholders. Even if permitted, such contracts and indeed any interest a director may have in a contract with the company must be disclosed by him, disclosed, however, not to the shareholders' meeting, but to his fellow directors (section 149 of the Act). A general declaration that he is a member of a company or firm interested in contracts with the company is sufficient (section 149 (3)). Where the provision of Table A, Article 72 is adopted, the director must not vote on contracts with a corporation of which he is a member.

It appears, then, that disclosure to the board of directors is deemed sufficient by the present law, no doubt because the law shares the view of the Cohen Committee that the presence on the board of independent directors will be a sufficient safeguard. The shareholders' meeting itself is out of the picture altogether, except that loans to directors granted by the company or under a guarantee or on a security provided by the company must be disclosed to the shareholders (section 128 (1) (*a*) and (*b*) of the Act).

By far the most important case of a potential conflict between interest and duty is the fixing of directors' fees and of managing directors' salaries, of pensions, and of 'compensation for loss of office'. It is here that the deficiencies of the present law are most glaring. The provisions of the Companies Act about the disclosure of directors' fees and salaries are difficult to reconcile with the spirit of the English legal tradition. The shareholders are entitled to know the total of the amount paid to the directors as remuneration for their services (section 128 (1) (2), and see section 128 (5)), but this does not apply in relation to a managing director. The aggregate amount of managing directors' salaries is secret, only the fees they receive must be included in the global announcement made to the shareholders (section 128 (3)). It is true that shareholders controlling twenty-five per cent. of the votes can demand a global disclosure of directors' (including

managing directors') remuneration, but this demand can be overruled by a simple majority of the shareholders (section 148). All this applies to pensions and also to compensation for loss of office.

The Cohen Committee have been aware of the urgent need for a reform of this branch of company law. They have made one radical suggestion which will, we hope, meet with general approval: 'It should be made illegal for any loan to be made by a company or by any of its subsidiary companies or by any other person under guarantee from or on security provided by the company or by any of its subsidiary companies to any director of the company' (No. 94). This provision would not, of course, apply to loans made by banks and similar institutions in the ordinary course of business.

On the making and the disclosure of other contracts in which a director is interested the Committee have not seen fit to recommend a major reform. They do not propose that the director should be made legally liable to inform the shareholders of a conflict of interest and duty, they only suggest, as a rule of moral conduct, that 'contracts of any magnitude in which any of the board have a substantial interest' should be disclosed in the directors' report. Beyond this, they confine themselves to the recommendation that a general declaration of interest under section 149 (3) should be included in the directors' minutes. They do not even propose to prohibit the voting of interested directors at board meetings. While no doubt, as the Committee say, a general prohibition would have been impracticable, the abstemiousness of the Committee in trying to suggest a *via media* must be deplored (No. 95).

Only in one respect does the Committee recommend a full disclosure: directors should, they suggest, declare in writing any direct or indirect interest they may have in the shares or debentures of the company or any of its subsidiaries. These interests should be recorded in a separate book open to inspection by the shareholders for fourteen days before the annual meeting (No. 87). The idea is to allow the public to know whether or not they are dealing with people in possession of inside information.

All these problems are, however, overshadowed by the crucial issue of directors' fees, salaries, pensions and compensation for loss of office. The Committee recommend that full disclosure should be made 'of the aggregate of directors' fees, and, separately, of the aggregate of their other remuneration',

which should include not only salaries but also expense allowances assessed as taxable income (No. 90). Similarly, they propose a global disclosure of pensions (No. 93) and of compensation for loss of office (No. 92 (a)). Moreover, they recommend that the payment to directors of fees or salaries tax free should be prohibited (No. 88) and that compensation for loss of office of a director, other than a managing director, should always be subject to the approval of the meeting (No. 92 (a)).

These proposals are, it is submitted, inadequate. The Committee have rejected the suggestion to extend the duty to disclose to the salaries of executives other than directors. They have also refused—and this is perhaps the most serious shortcoming of the whole Cohen Report—to recommend that 'the remuneration payable to each director should be shown separately'. 'Apart from any objections which might be felt by the individuals concerned, we do not think that the shareholders would be in a position to estimate the value of the services of an individual director without detailed information as to the duties he performs, whereas by comparison of the total with the results of the company they can form a rough estimate as to whether they are getting proper value out of the services as a whole' (No. 90).

It should be noted that the Committee did not *expressis verbis* adopt the view of one of their members that 'an individual is entitled not to make public the amount of his income, a principle which is in consonance with the traditions of this country', but they did not dissent from this view with the vigour one might have desired, and, in effect, they suggested a policy inspired by this *dictum*. At the beginning of the Report (No. 1) the Committee disclaim any intention of dealing with matters of 'economic policy'. It is at the point now under discussion more than anywhere else that the unreal separation of 'legal' and 'economic' policies breaks down. In recommending the continuance of the secrecy of directors' and leading executives' salaries the Committee have pledged themselves to an 'economic policy' no less than if they had made the opposite recommendation. The vast majority of fixed salaries and wages are a matter of public knowledge. This is true of the remuneration of all public servants from the Prime Minister and the Lord Chancellor down to the police constable and the postman, and of the incomes of all those wage earners whose earnings are fixed by the processes of collective bargaining. Incomes

derived from profits, investments, commissions, professional fees, etc. are usually kept secret in view of the exigencies of a system of competitive enterprise. Secrecy of income is the corollary of the taking of risks. It is, within the framework of a society such as our own, justified by its dependence on the fluctuations of a market. The privilege of secrecy of fixed salaries paid for services rendered is the preserve of a small minority of the more highly-placed business executives. One cannot have it both ways: either these salaries are what they purport to be, rewards for work done, in which case there is no justification for keeping them secret, or they are a concealed method of sharing the profits without bearing the losses, in which case they should not be paid. These remunerations are drawn whether business is good or bad, their amount bears no relation to a risk incurred, they are only justifiable by the quality of the work for which they are paid. Business executives are not 'self-employed'. Like civil servants, workmen, schoolteachers and others they are morally liable to satisfy their employers and the public that they deserve their pay. The money which flows into the pockets of the company director or executive is 'shareholders' money'. The shareholders are entitled to obtain the material facts which enable them to compare performance with reward, not of the board of directors or of the managers as a whole, but of each individual. Against a fundamental public policy of this kind 'objections which might be felt by the individuals concerned' are of little weight, and the shareholders themselves can be left to judge whether the information disclosed to them enables them to draw their conclusions.

The Cohen Committee have shown themselves anxious to secure to the public improved opportunities for the inspection of 'material contracts' (No. 31) and for obtaining information on the price of property purchased or acquired by the company (No. 30). Even the present law requires public companies to lay open to a considerable extent transactions outside the ordinary run of current business. Service agreements with business executives are not 'contracts entered into in the ordinary course of business'. They are as vital from the shareholders' and the public's point of view as the purchase of new business premises or the acquisition of a patent. Why, then, should they form an exception to the general rule and remain a closely guarded secret? The need for this disclosure is much greater than it is in the case

of contracts with outsiders, because they raise the problem of the conflict between interest and duty. It is to be hoped that Parliament will enforce the disclosure of individual fees, salaries, pensions and compensation for loss of office.

VII

The thorniest of all the thorny problems confronting the Committee was that of nominee shareholders. While most of the questions discussed in the Report have, in one form or another, occupied the minds of company lawyers everywhere, this issue of nominee shareholdings is a peculiarly English problem. It does not arise where bearer shares are usual, although even there the exercise by banks of voting powers vested in their customers is a widespread and much discussed phenomenon. The Cohen Committee make the interesting point (No. 77) that it is now the practice to call up 'almost at the outset the whole of the issued share capital'. One of the weightiest arguments against nominee shareholdings is thereby removed, because the outside creditor's interest in inspecting the register of members and in finding out the names of those still liable to pay calls no longer exists. It may be said that section 70 of the present Act permits the issue of bearer shares, provided the amount of the shares has been fully paid. Why, if the law thus allows anonymity of shareholding, should there be any objection to nominees? One answer might be that section 70 does not operate unless the articles have made specific provision to this effect, while a beneficial owner who holds his shares through a nominee, forces the anonymity of his own beneficial membership upon a possibly unwilling company.

The Committee have refused to recommend the prohibition of registrations in the names of nominees (No. 78), nor have they recommended a compulsory register of beneficial ownership for all companies—a recommendation which might have necessitated a repeal or recasting of the present section 101. On the other hand, they have (No. 79) enumerated four arguments militating in favour of a disclosure of beneficial ownership. Two of these—the danger of acquisition of control by foreigners, and the case of the press—might be dealt with by special legislation, the third—the danger of unscrupulous directors making illegitimate use of inside information under the cloak of nominees—has been discussed in a different context, and largely removed by the

Committee's own recommendations (No. 87). There remains the objection to anonymous shareholdings 'that a register of beneficial ownership would be useful to a shareholder who wishes to consult his fellow shareholders as to the affairs of the company'. The Committee recognise the weight of this argument. Indeed 'in principle' they 'consider that shareholders and the public are entitled to know in whom control is vested', and that no legitimate purpose would be prejudiced by a full disclosure of beneficial ownership. They reject it solely on the ground that it would impose a great deal of work and that it would be difficult to enforce (No. 80).

Clearly the Committee are in favour of maintaining the present system of registered shareholdings and would not welcome a more widespread use of bearer shares. In spite of whatever arguments may be adduced in favour of the nominee practice, the fact remains that it frustrates the objects of the provisions of the law which deal with the register of members. On the other hand, the argument that a prohibition of nominee registrations or a compulsion to register beneficial ownership would be difficult to enforce carries much weight (though its strength is diminished by the fact that the Committee themselves suggest a method of enforcement in the case of 'exempt' private companies (No. 53)). Moreover, any form of suppression of anonymous ownership would be useless unless it was accompanied by a repeal of section 70 of the present Act which the Committee for good reasons was not prepared to recommend (No. 83).

It is in circumstances such as these, in cases which defy a solution by a legislative formula, that recourse must be had to the flexible machinery of administration. The Committee recommend that the Board of Trade should be empowered to investigate through an inspector the ownership of shares in any company, if they consider it necessary in the public interest, and that they may, in this event, direct the company not to pay dividends or permit the exercise of any rights (including rights of transfer) attaching to such shares (Nos. 84, 85). This possibility of investigation by the Board of Trade is probably the only way in which this Gordian knot could have been cut. The Committee have also recommended two auxiliary innovations: a declaration by the transferee of shares whether he is the beneficial owner or a nominee (No. 81—this surely would have to be supple-

mented by a corresponding duty on the part of the first subscriber), and an obligation imposed upon the beneficial owner of ten per cent. or more of the capital or any class of capital to disclose his interest, which would be entered in a register of beneficial ownership (No. 82). One cannot help wondering whether this complicated mechanism would be easier to handle than a straight prohibition, subject to certain general exceptions (*e.g.*, in the case of active trustees) and to a dispensing power vested in the Board of Trade.

The separation of legal ownership and beneficial interest is a perennial problem of English law. Henry VIII did not solve it, and it will hardly be solved this time.

VIII

We can only note in passing a number of minor recommendations such as those to simplify the annual return (No. 73) and the keeping of registers (Nos. 74, 75, 173), to prohibit the exemption from liability of a debenture trustee (No. 64) and to assimilate the legal status of a receiver appointed by the Court and of a receiver appointed by a debenture holder (No. 68). In connection with winding-up the Committee propose to reform the 'declaration of solvency' (Nos. 144, 145), to strengthen the legal provisions against fraud (Nos. 146 to 151), and to enlarge the preferential rights of employees and workmen (No. 153). Their most interesting suggestion in this context is that the Court should have power to impose a settlement of their internal disputes upon the shareholders, including the purchase of the shares of an oppressed minority by the majority at a price to be fixed by the Court. Such an order could be made whenever a shareholder petitions for a compulsory winding-up under the 'just and equitable' clause (No. 152).

The ultimate sanction for compliance with the standards of conduct exacted by the law must be an efficient machinery of criminal prosecution. The Committee are highly critical of the existing system, mainly on the ground that the Director of Public Prosecutions is required to consider not only the probability of success but also whether it is in the public interest that he should prosecute. In Scotland the Lord Advocate must prosecute whenever there is a likelihood of securing a conviction. The Committee 'have no hesitation in recommending that, at least as regards offences under the Companies Act, the English system should

be assimilated to the Scottish and that, accordingly, it should be laid down that in any case in which the Director considers that a prosecution ought to be instituted, he should institute it himself' (No. 161). This is a matter of profound significance, far beyond company law itself; if this vital recommendation is adopted the powers conferred and the duties imposed upon the Director will be similar to those of a public prosecutor in the American and Continental sense. The time-honoured English system of 'private prosecutions' has largely proved to be inadequate in the face of modern company practices.

O. KAHN-FREUND.

DIVISIONAL COURT PRECEDENTS

A SERIES of proceedings[1] which were brought to test the legality of newspaper advertisements of certain competitions raises a number of questions on the status and binding effect of rulings of a Divisional Court. A metropolitan magistrate, who had decided a case in accordance with the decision[2] of a Chancery judge of first instance, refused to state a case for the opinion of the High Court on the ground that, so far as he was concerned, the law on the matter was decided and, therefore, that there was no point of law on which he could properly state a case. He relied on the decision in *R.* v. *Shiel*[3] to the effect that a magistrate ought not to be ordered to state a case when he has decided the point of law in accordance with a previous decision upon the same point in the Queen's Bench Division from which there was no right of appeal. *R.* v. *Shiel*, however, was held by a Divisional Court[4] not to excuse the magistrate from stating a case and accordingly an order of mandamus was issued requiring him to state a case for the opinion of the High Court.

R. v. *Shiel* was distinguished on the ground that in that case the previous precedent[5] had issued from a Divisional Court, while in the instant case the decision which the magistrate had 'held to be of the same effect as the decision in *Carritt* v. *Godson* was one by a learned judge of great authority in the Chancery Division in a case in which he was not the final court of appeal'. Lord Caldecote C.J. continued his judgment as follows[6]:—

> If, in the present case, the magistrate states a case, there is, in my opinion, an obvious point of law which is open to the party aggrieved by the magistrate's decision, and that is whether or not the judgment of Eve J. was a right decision in the matter before him, and also, no doubt, whether or not that decision is binding on this Court. The party aggrieved by the magistrate's decision asks for an opportunity of bringing that decision before this Court, which is the final court of appeal in a criminal

[1] *R.* v. *Sir Bertrand Watson; Ex p. Bretherton*, [1945] K.B. 96, Div. Ct.; *Bretherton* v. *U.K. Totalisator Co., Ltd., ibid.*, 555, Div. Ct.; *Elderton* v. *U.K. Totalisator Co., Ltd.*, 61 T.L.R. 529, Uthwatt J.; *S.C.*, [1946] K.B. 57, C.A.
[2] *Elderton* v. *U.K. Totalisator Co., Ltd.*, [1935] Ch. 373, Eve, J.
[3] (1900), 82 L.T. 587, C.A.
[4] *R.* v. *Sir Bertrand Watson; Ex p. Bretherton*, [1945] K.B. 96.
[5] *Carritt* v. *Godson & Son*, [1899] 2 Q.B. 193, Div. Ct.
[6] [1945] K.B., pp. 99–100.

> cause or matter, and I cannot see how it can be said that a judgment of a judge who is not the final court of appeal is, nevertheless, so final that it cannot even be questioned in this Court which is the final court of appeal for these proceedings.

The above passage from the judgment of Lord Caldecote C.J., while allowing the Divisional Court the last word in the matter, leaves it as an open point of law whether or not the Court would be bound by the decision of the judge of first instance. When, however, the point of substantive law duly came before a Divisional Court on a case stated,[7] that Court had no hesitation in refusing to follow the earlier decision of the judge of first instance. Lord Goddard, in delivering the judgment of the Court, said[8]: 'This appeal is brought to test the correctness of that decision'.

Yet the test did not prove conclusive for when, shortly afterwards, the same point of law came before Uthwatt J. in an action in the Chancery Division[9] he apparently did not hold himself bound by the Divisional Court ruling. Faced by conflicting decisions of a judge of first instance in the Chancery Division and a later decision of a King's Bench Divisional Court, he said:—

> In the light of this conflict I am bound, I think, to express my own view rather than to treat the matter as concluded in this Court by the later decision; and I take this course with the less hesitation by reason of the assurance given to me that, whichever way I decide the point, the case will go to a higher Court.

Uthwatt J. did, in fact, decide the point of law in the same way as the Divisional Court, and his decision was upheld on appeal.[10] The Court of Appeal did not refer to the question of the binding effect of the precedents.

The uncertain handling in this group of cases of the doctrine of *stare decisis* in its application to Divisional Court rulings is not the result of scanty judicial authority on the subject. There have been many relevant pronouncements since the Judicature Act, 1873, made it necessary for the decisions of the newly established Divisional Courts to be fitted into the system of judicial precedent. The extensive literature which has been devoted to this system has hitherto given no special

[7] *Bretherton* v. *U.K. Totalisator Co., Ltd.*, [1945] K.B. 555.
[8] *Ibid.*, p. 559.
[9] *Elderton* v. *U.K. Totalisator Co., Ltd.*, 61 T.L.R. 529.
[10] [1946] K.B. 57, C.A.

consideration to the precedents of the Divisional Courts. They can best be considered in relation to the decisions of other Courts before the question of whether or not Divisional Courts are bound by their own decisions is dealt with.

DECISIONS OF JUDGES OF FIRST INSTANCE

Authority for saying that a judge of first instance is bound to follow a decision of a Divisional Court is to be found in the case of *Village Main Reef Gold Mining Co., Ltd.* v. *Stearns*, in which Kennedy J. said[11]: 'That was a decision of a Divisional Court and is therefore binding on me . . . I must follow that decision'.

Conversely, it has even been held by a judge sitting in a Divisional Court that he was bound by a judgment of a judge of first instance. In *Casson* v. *Churchley* Grove J. said[12]: 'In accordance with the rule that where there is power to appeal the Courts are bound by the decision of Courts of co-ordinate jurisdiction, we are bound by the judgment of Fry J.'[13] The reason for this apparently curious view was that the Divisional Court was hearing an appeal from a county court, and a further appeal lay to the Court of Appeal to which appeal from judges of first instance also lie. If the fact of subjection to the same court of appeal makes two courts co-ordinate in their jurisdiction, so far as the binding force of their precedents are concerned,[14] it can have small effect on the authority of contemporary Divisional Court decisions, even if Grove J.'s opinion is acted on. His opinion could never have affected criminal appeals by way of case stated as in those appeals the Divisional Court is the final court of appeal, and it could have touched county court appeals only before the passing of the Administration of Justice (Appeals) Act, 1934, directed them to be heard by the Court of Appeal. Grove J.'s opinion does, however, provide some historical basis for Lord Caldecote C.J.'s uncertainty in *R.* v. *Sir Bertrand Watson*[15] whether or not the Divisional Court in that case was bound by the decision of Eve J. In *Bretherton* v. *U. K. Totalisator Co.*,

[11] (1900), 5 Comm.Cas. 246, 247, 248.
[12] (1884), 53 L.J.Q.B. 335, 336. Huddleston B. (p. 337) found 'clear authority on the proposition by a court of co-ordinate jurisdiction' with which he agreed.
[13] *Swift* v. *Pannell*, 24 Ch.D. 210.
[14] This argument has not been applied to the Court of Appeal and the Court of Criminal Appeal; they hold themselves free not to follow each other's decisions, although they are subject to review by the same appellate tribunal.
[15] *Cit. sup.*, p. 257.

Ltd.,[16] where there was no power to appeal further, the Court expressed no doubt about its not being bound by that decision and it was not followed. This attitude accords with that of Lord Alverstone C.J. in *Brass* v. *L. C. C.*[17]: 'Though we are not bound by the decision of a judge sitting alone in the Chancery Division, we should not differ from it unless we were clearly satisfied that it was wrong'.

DECISIONS OF THE COURT OF APPEAL

A Divisional Court is bound to follow a decision of the Court of Appeal. In *Read* v. *Joannon* Lord Coleridge C.J. said[18] that the Divisional Court in which he was sitting had 'no right to disregard' decisions 'whether by a court of appeal or by a court of co-ordinate jurisdiction'. This was said in a case in which a further appeal lay to the Court of Appeal, but there is no support for the distinction in this connection between such a case and one in which the Divisional Court is the court of last resort. In *Scott* v. *Director of Public Prosecutions*, in a Divisional Court which was hearing an appeal by way of case stated, Atkin J. said[19] with regard to a previous decision: 'This is a decision by the Court of Appeal which, so far as I am aware, has never been questioned, and is binding on us'. Recently, on a case stated, Humphreys J. followed[20] 'a decision which is clearly binding upon us, because it is a decision of the Court of Appeal'.

DECISIONS OF THE COURT OF CRIMINAL APPEAL

There appears to be no authority on the question whether a Divisional Court is bound by a decision of the Court of Criminal Appeal. The mere fact that the Divisional Court in a criminal case is a court of last resort would not prevent its being bound, for it is bound by decision of the Court of Appeal in the same circumstances. But the authority of the decisions of the Court of Appeal over Divisional Courts may depend on the fact that the Courts are the higher and lower branches respectively of the same Court, the Supreme Court of Judicature. The Court of Criminal Appeal stands apart and could not support

[16] *Cit. sup.* p. 258.
[17] [1904] 2 K.B. 336, 340, Div. Ct. (case stated).
[18] 25 Q.B.D. 300, 302, 303, Div. Ct. (City of London Ct. appeal). In *Kinahan & Co., Ltd.* v. *Parry*, [1910] 2 K.B. 389, 393, Div. Ct. (Cnty. Ct. appeal), Lord Coleridge J. said that he would have been bound by a certain decision of the Court of Appeal if it had been in conflict with a later Divisional Court decision.
[19] [1914] 2 K.B. 868, 879.
[20] *Moore* v. *Elphick*, [1945] 2 A.E.R. 155, 160.

the authority of its decisions by this argument. On the other hand, the Court of Criminal Appeal is an appellate court from superior courts, assizes being superior courts, while a Divisional Court is an appellate court from inferior courts. It would seem, however, logical to say that if the Court of Appeal is justified in refusing to follow the decisions of the Court of Criminal Appeal, as it claims, Divisional Courts are justified also; if the rule were otherwise a Divisional Court might find itself presented with two conflicting decisions of different courts both of which were binding. It must be admitted, however, that a general rule that a Divisional Court is bound by a decision of the Court of Criminal Appeal might reasonably be framed subject to a proviso that, in the case of such a conflict of superior decisions, that of the Court of Appeal must be followed. On what may perhaps be called the merits of the question the arguments are fairly evenly divided. In practice, points of criminal law are just as thoroughly, if not more thoroughly, considered in a Divisional Court as they are in the Court of Criminal Appeal. A case stated may come before two judges and not three, as in the Court of Criminal Appeal, but three judges is now the usual number on an appeal by way of case stated. And Divisional Courts appear more ready to reserve judgment than does the Court of Criminal Appeal. But the fact that a Divisional Court usually gives separate judgments may be taken to weaken the force of a ruling compared with one which is the judgment of the court, as the rulings of the Court of Criminal Appeal almost invariably are.

Although one court is concerned with indictable offences and the other with offences punishable on summary conviction there is much substantive criminal law common to the two jurisdictions. The text-books draw too rigid a line between the decisions in the two courts: there are authorities in *Stone* which could, but which do not, find a place in *Archbold*, and *vice versa*. The question of the comparative authority of the two types of courts of criminal appeal did arise in connection with the Court for the Consideration of Crown Cases Reserved. In *Hawke* v. *Mackenzie* Darling J. said [21]: 'I agree that the case of *Stoddart* v. *Argus Printing Co.*[22] is in conflict with *R.* v. *Stoddart*[23] and that the latter decision must prevail'. And

[21] [1902] 2 K.B. 225, 232, Div. Ct. (case stated).
[22] [1901] 2 K.B. 470, Div. Ct. (case stated).
[23] [1901] 1 K.B. 177, Ct.C.C.C.R.

Channell J. was of the same opinion [24]: 'I also agree that we are not bound by *Stoddart* v. *Argus Printing Co.* which is in conflict with *R.* v. *Stoddart.* As there is no appeal from our present decision we must decide between the conflicting decisions, and I have no doubt that *R.* v. *Stoddart* is the one by which we are bound and which we ought to follow'. On the strength of this precedent the Divisional Court may hold, when the question arises, that it is similarly bound by a decision of the modern Court of Criminal Appeal.

DECISIONS OF DIVISIONAL COURTS

(a) With regard to decisions of courts of co-ordinate jurisdiction the common law drew a distinction between cases in which there was a right of appeal to a higher court and cases in which the decision of the court was final. In *Taylor* v. *Burgess* Pollock C.B. said [25]:—

> When a case can be taken to a court of error, the decision of one court of co-ordinate jurisdiction ought to be binding on the others. When, however, there is no means of appealing to a court of error, there is not the same obligation to follow the decision of another court; and accordingly we sometimes find courts of co-ordinate jurisdiction differing from each other.

This distinction has been acted on in Divisional Courts. In delivering the judgment of the court in *Fortescue* v. *Vestry of St. Matthew, Bethnal Green,* Charles J.[26] said of an earlier Divisional Court decision: 'Were it not that it is a criminal case in which no appeal is possible we should feel bound to act on the judgment of the majority of the court' in that case. It has already been observed [27] that this distinction has been applied so as to make a Divisional Court bound by a decision of a judge of first instance in a case in which an appeal lay to the Court of Appeal. The distinction has not been referred to in express terms in recent years though it is supported by much authority, which will be noticed later, and was acted on in practice for a considerable time. A puzzling situation was presented to Pollock B. in *Vernon* v. *Watson,*[28] when a

[24] [1902] 2 K.B., p. 233.
[25] (1859), 5 H.&N. 1, 5. This distinction also applies in the Irish and Australian Courts: see an article in 61 L.T. Newsp. (1876) 245.
[26] [1891] 2 Q.B. 170, 179.
[27] *Supra,* p. 259.
[28] [1891] 1 Q.B. 400, Div. Ct. (Cnty. Ct. appeal).

Divisional Court from which there was a right of appeal had to consider a precedent of a Divisional Court from which there had been no right of appeal. Pollock B. did not give any clear guidance in the difficulty [29] :—

> Although I do not go so far as to say that in every case and under all circumstances the Court is absolutely bound by a decision of another Divisional Court, still, according to all the ordinary rules by which the practice of the Court is regulated, the decision to which I have referred is one by which we should abide. It is urged that we need not follow that decision because it was a case in which there was no right of appeal from the Divisional Court. That is a contention which cannot prevail; but, under the circumstances, we will give leave to appeal.

(b) There are cases in which the Lord Chief Justice has thought it desirable to call together a specially constituted Divisional Court for the purpose of considering whether a precedent should be disregarded. Lord Coleridge C.J. on an appeal by way of case stated summoned [30] a Divisional Court consisting of himself and four other members to consider a previous decision of a Divisional Court of three judges of whom he was the dissentient. According to the judgment of the Court,[31] ' there being no appeal, and the matter being of general importance, it has been considered right to have the question reargued before a specially constituted Divisional Court of five members '. The previous decision was not followed; the headnote to the report declares that it was ' overruled ', but the judgment does not expressly claim to have overruled it.

On the strength of this example Lord Russell of Killowen C.J. called together [32] a Divisional Court consisting of himself, the President of the Probate, Divorce and Admiralty Division, a Lord Justice of Appeal, and four puisne judges to rehear an appeal by way of case stated in which the Lord Chief Justice and Mathew J. had differed in opinion. In giving judgment Lord Russell of Killowen C.J. said [33] :—

> In weighing previous authorities it is further to be recollected that the cases have come before Divisional Courts usually consisting of two members, and that, those cases being in their nature criminal, there has been no

[29] *Ibid.*, p. 402.
[30] *Fortescue* v. *Vestry of St. Matthew, Bethnal Green*, [1891] 2 Q.B. 170.
[31] Delivered by Charles J., *ibid.*, 179.
[32] *Kruse* v. *Johnson*, [1898] 2 Q.B. 91.
[33] *Ibid.*, 102.

> judgment of a Court of Appeal upon them. It is for this reason that the present special Court has been constituted. I cannot doubt that this Court has authority to review and, if it thinks fit, to differ from any prior decision of a Divisional Court on the subject: see *Fortescue* v. *Vestry of St. Matthew, Bethnal Green.*[34]

According to the distinction which turned on the existence or non-existence of a right of appeal, the right of refusal to follow a decision given on an appeal by way of case stated was possessed by any Divisional Court, and Lord Russell of Killowen C.J. did not hesitate to depart from precedent in such cases.[35] The object of summoning a special Court was that its decision would be treated as authoritative even if it were denied the formal power of overruling. Yet Mathew J. in *Kruse* v. *Johnson* said on the rehearing [36] on which, abiding by his previously expressed opinion, he was the only dissentient:—

> The judgments of the majority of the judges by whom this case is decided will, no doubt, be entitled to great respect from those who may have similar cases to deal with; but the decision will not be binding on any other Divisional Court, and in the present state of the law there seems to be no mode of finally settling the difference of judicial opinion that may arise in cases like the present. A change of procedure would seem to be necessary which would permit an appeal in the ordinary way.

On this view, and there is logic in its favour, the decision of a specially constituted Divisional Court, at least where there is no further right of appeal, has only the status of a conflicting precedent [37] when it refuses to follow an earlier decision, though naturally a precedent of great weight, short of being strictly binding.

There appears to be no recent instance of a specially constituted Divisional Court disregarding a former precedent. If the rule at the present day is that a Divisional Court is normally bound by its own decisions there is much to be said for a reserve power possessed by a special sitting of the Court [38] A special sitting of the 'full' Court of Appeal is just as much bound by its previous decisions as is the ordinary Court of

[34] *Cit. sup.*, n. 30.
[35] *Vide infra*, p. 265.
[36] [1898] 2 Q.B. p. 113.
[37] For conflicting Divisional Court precedents *vide infra*, p. 270 *et seq.*
[38] As is the practice in the Scottish Court of Session: see Lord Macmillan (95 L.J.Newsp. (1945), 7) referring to John C. Gardner's *Judicial Precedent in Scots Law* (Edinburgh, 1936).

three members.[39] On the other hand, the Court of Criminal Appeal when composed of more than the usual quorum of three members has refused to follow[40] a previous decision of the Court, although normally it holds itself bound by its own decisions.

(c) The neglect of the distinction between Divisional Courts which are courts of last resort, and those which are not, did not lead to a weakening of the binding force of precedent. The contrary was the case, for the strict rule came to be accepted by all types of Divisional Court. In the nineteenth century the Queen's Bench was not strictly bound by a previous decision in a magisterial case,[41] and Lord Russell of Killowen C.J. had no hesitation on an appeal by case stated to a Divisional Court in refusing to follow a previous Divisional Court ruling even when he had not called together a specially constituted court. In *Logsdon* v. *Booth*[42] he refused to follow an earlier case, and in delivering the judgment of the Court which consisted of three members said[43]:—

> Differing from the decision of the Court in that case, ought we nevertheless to act upon it? We think not. The law being criminal in its nature could not have been brought under review by appeal . . . we say the case of *Booth* v. *Ferrett* was wrongly decided.[44]

In another case heard on the same day he again refused to follow[45] an earlier decision: 'In our opinion that case was wrongly decided'.

There are, however, to be found expressions of opinion by puisne judges of this period that they were bound to follow previous decisions on appeals by way of case stated.[46] But the

[39] *Young* v. *British Aeroplane Co., Ltd.*, [1944] K.B. 718, pp. 725–728, C.A.
[40] *R.* v. *Norman*, [1924] 2 K.B. 315.
[41] *R.* v. *Pilkington* (1853), 2 El.&Bl. 546, *per* Lord Campbell C.J. at p. 552, and Coleridge and Crompton JJ. at pp. 554, 555.
[42] [1900] 1 Q.B. 401, Div. Ct. (case stated).
[43] *Ibid.*, pp. 413, 414.
[44] The headnote to the report declares that *Booth* v. *Ferrett* (1890), 25 Q.B.D. 87, Div. Ct. (case stated) was 'overruled'. In *Logsdon* v. *Trotter*, [1900] 1 Q.B. 617, 623, Channell J. said that *Booth* v. *Ferrett* had 'been conclusively disposed of by the decision of *Logsdon* v. *Booth*'.
[45] *Armstrong* v. *L. C. C.*, [1900] 1 Q.B. 416, 425, Div. Ct. (case stated). The headnote again declares that the case was 'overruled'.
[46] See Channell J. in *White* v. *Morley*, [1899] 2 Q.B. 34, 38, Bigham J. in *Thomas* v. *Van Os*, [1900] 2 Q.B. 448, 453, Bruce J. in *Moses* v. *Marsland*, [1901] 1 K.B. 668, 671, Wills J. in *L. C. C.* v. *Illuminated Advertisements Co.*, [1904] 2 K.B. 886, 891, Bray J. in *Giebler* v. *Manning*, [1906] 1 K.B. 709, 718, all in Div. Cts. on case stated. Wright J. in *Jones* v. *Walters* (1898), 14 T.L.R. 265, 266, said the Court was bound 'unless there was any very strong reason to the contrary'. See also Ridley J. in *Wright & Son* v. *Bull*, [1900] 2 Q.B 125, 127 (Cnty. Ct. appeal). As early as 1882 Grove J.

view that a Divisional Court is bound by its own previous decisions, whatever the nature of the appeal, probably owes its general acceptance to Lord Russell of Killowen C.J.'s successor, Lord Alverstone. In *Morris* v. *Beal*,[47] when the Court was considering a previous decision of a Divisional Court of which Lord Alverstone C.J. was a member, he said[48]: 'It is possible that grounds may be suggested for reviewing that decision, but at all events we are bound by it here'. He considered the question of the binding effect of precedents more fully in *L. C. C.* v. *Schewzik*[49] in which he followed a prior decision with reluctance, as he thought he ought not to distinguish it, and added[50]:—

> I only desire to say, coming to that conclusion, that there is an important matter which I have mentioned more than once since I have been sitting in this Court, and I refer to it again because of its extreme importance, and that is the importance of uniformity in the decisions of this Court. The Court of Appeal have recently recognised that it is desirable in the public interest, and in order that people may know with certainty what their position is, that courts of co-ordinate jurisdiction should follow their decisions unless there are strong grounds which enable the Court to say that the previous decisions ought not to be followed'.

After this pronouncement Lord Alverstone C.J. continued to hold himself bound by previous decisions.[51]

Lord Alverstone C.J. does not give references to the case or cases in the Court of Appeal which he had in mind. He may have been thinking of *L. C. C.* v. *Wandsworth B. C.*[52] in which the Court of Appeal reversed a decision of a Divisional Court of which he was a member, Vaughan Williams L.J. saying[53]: 'In this case the Divisional Court only followed the decision in

expressed this view (*Davies* v. *Evans*, 9 Q.B.D. 238, 241, Div. Ct. (case stated)), but he later approved of the effect of the distinction between the two types of appeal: *Casson* v. *Churchley* (1884), 53 L.J.Q.B. 335, 336, Div. Ct. (Mayor's Ct. appeal), *vide supra*, p. 257.

47 [1904] 2 K.B. 585, Div. Ct. (case stated).

48 *Ibid.*, p. 590. Kennedy and Phillimore JJ. both agreed that the decision was binding (see p. 592).

49 [1905] 2 K.B. 695, Div. Ct. (case stated).

50 *Ibid.*, p. 700. Ridley J. said (p. 702): 'I should certainly have come to the contrary conclusion myself, but I follow what the Lord Chief Justice says, and I consider myself bound by that case'.

51 *R.* v. *Roberts*, [1907] 2 K.B. 878, 883, Div. Ct. (certiorari); *Evans* v. *Weatheritt*, [1907] 2 K.B. 80, 84, Div. Ct. (case stated).

52 [1903] 1 K.B. 787.

53 *Ibid.*, p. 806.

Fulham Vestry v. *Minter*[54] which bound them. It does not bind us, and, as we think it was wrongly decided, we must reverse the decision of the Divisional Court'. And in *R.* v. *Sunderland JJ.*,[55] another successful appeal from a Divisional Court of which Lord Alverstone C.J. was a member, A. L. Smith M.R. said[56]: 'I do not see how the Divisional Court could have decided otherwise than they did having regard to the decision in *R.* v. *Stockport JJ.*,[57] but we are not bound by that case'.

When the Court of Appeal made these declarations on the binding force of Divisional Court precedents it was referring to cases in which the Divisional Court was not the final court of appeal. The Court of Appeal did not say that every type of Divisional Court was bound by its own decisions. The question of the binding force of such decisions when the Divisional Court is the final court of appeal did not directly come before the Court of Appeal. The question could not, in fact, ever come directly before the Court of Appeal. But Lord Alverstone C.J., in accepting the ruling of the Court of Appeal, applied it without discrimination to Divisional Courts generally. In so doing he was probably also influenced by the example of the Court of Appeal holding itself bound by its own decisions.

The strictness of the new rule might have been eased if a wide interpretation had been given to the 'strong grounds' mentioned[58] by Lord Alverstone C.J. as justifying a departure from precedent. But this qualification underwent no development: in later cases the strict rule is stated shorn of this limitation. In 1916 Avory J. said[59] of a case decided in the previous year: 'We are bound by the decision there given, if the same state of facts exists'. In 1923 Lord Hewart C.J. expressed[60] the same opinion of a Divisional Court decision: even if he were disposed to differ from it he 'should still be bound by the authority of that decision'. This recognition

[54] [1901] 1 K.B. 501, Div. Ct.
[55] [1901] 2 K.B. 357.
[56] *Ibid.*, 368.
[57] (1896), 60 J.P. 552, Div. Ct.
[58] In *Schewzik* v. *L. C. C.*, *cit. sup.*, p. 266.
[59] *R.* v. *Burnley JJ.*, 115 L.T. 525, 530, Div. Ct. (case stated), referring to *Theatre de Luxe (Halifax), Ltd.* v. *Gledhill*, [1915] 1 K.B. 49, Div. Ct. Atkinson J. said in *Harman* v. *Butt*, [1944] K.B. 491, 498, referring to these two cases: 'The Divisional Court, which was of co-ordinate jurisdiction with the Court which decided the *Halifax Case*, was not inclined to follow the *Halifax Case* unless it was driven to it'.
[60] *R.* v. *Godfrey*, Div. Ct. (habeas corpus) in 92 L.J.K.B. 205, 207; 128 L.T. 115, 117; 27 Cox C.C. 338, 342. Similarly the other members of the Court, Avory and Sankey JJ., in [1923] 1 K.B. 24, 30.

of the strictly binding nature of all previous decisions in the Divisional Courts has continued down to the present time. In 1944 Lawrence J. said,[61] referring to a case decided in the same year, ' This point has already been disposed of by a Divisional Court in *British Doughnut Co., Ltd.* v. *Dale* [62] which would be binding on us '. In two judgments [63] of Humphreys J. in 1945 we have these statements : ' That case is clearly binding on this Court ', and ' That is a decision which is binding upon us '.

The Court of Appeal has continued to express approval,[64] on appeals from Divisional Courts, of the action of the court below in holding itself bound by its own decisions. In *De Vries* v. *Smallbridge*,[65] in which the Divisional Court had followed a previous decision of a Court composed of three judges, Scrutton L.J. commented that the members of the court below ' thought they ought to observe the rule of that Court, which is to respect the decision of a Court of three judges, and so they reversed the decision of the county court judge '. This suggestion that the binding effect of a Divisional Court ruling depends on the number of members [66] of the Court seems to be unique. It could not have found favour under the older practice [67] of the Divisional Court, according to which three judges sat in cases in the Crown paper and two in cases in the civil paper; appeal lay from the court of two judges while the court of three judges was, in most cases, the final court of appeal. The distinction, if it had existed, would have been the other way, unless Scrutton L.J. is suggesting that a county court appeal, heard by three judges in place of the usual two, would provide, by exception, a binding precedent even though there was a right of appeal. But elsewhere [68] he stated in

[61] *Concentrated Foods, Ltd.* v. *Champ*, [1944] K.B. 342, 348, Div. Ct. (case stated).

[62] [1944] K.B. 228, Div. Ct. (case stated).

[63] *R.* v. *Sunderland JJ.*, [1945] K.B. 502, 508, Div. Ct. (case stated), referring to *McGregor* v. *Telford*, [1915] 3 K.B. 237, Div. Ct. (case stated), and *Ross* v. *The English Steel Corporation, Ltd.*, [1945] 2 A.E.R. 606, 608, Div. Ct. (case stated), referring to *Felton* v. *Heal*, [1920] 3 K.B. 1, Div. Ct. (case stated). And *a fortiori* up to the time of the abolition of the hearing of county court appeals by Divisional Courts the Judges in these Courts continued to hold themselves bound by a single previous decision, *e.g.*, Acton J. in *Baker* v. *E. Longhurst & Sons, Ltd.*, [1933] 2 K.B. 461, 462, 463, Goddard J. in *Knott* v. *L. C. C.*, [1934] 1 K.B. 126, 132.

[64] *Phillips* v. *Copping*, [1935] 1 K.B. 15, 18, *per* Scrutton L.J., *Fordree* v. *Barrell*, [1931] 2 K.B. 257, 260, *per* Scrutton L.J.

[65] [1928] 1 K.B. 482, 486.

[66] It has no relation to the constituting of a special Divisional Court of more than the usual number of members for the express purpose of considering a particular precedent: *supra*, p. 263.

[67] See *Annual Practice*, 1945, p. 1353.

[68] *Supra*, n. 64.

general terms that a Divisional Court was bound by its own decisions. When a Divisional Court is composed of members of the Court of Appeal sitting as additional judges of the King's Bench Division the Court will hold itself just as much bound as a Divisional Court constituted in the ordinary way.[69]

When a Divisional Court is equally divided and the appeal fails as a consequence a subsequent Divisional Court is not bound to follow the decision; it will follow the judgment which it thinks correct.[70] The rule in the Court of Appeal when that Court is equally divided is now the other way; the precedent is treated as being one in which the appeal was dismissed by a majority.[71] But a Divisional Court is, like the Court of Appeal,[72] not bound[73] by a decision given *per incuriam*. Another kind of exceptional instance in which a Divisional Court has held itself not to be bound is found in *Re a Solicitor*[74] where Lord Caldecote C.J. held[75] that, having regard to the language used by Avory J. in an earlier case,[76] the Court was 'free to arrive at any decision which it thinks right in the matter without treating that decision as a binding authority'. In the earlier case the Court did not have the opportunity of fully considering the question raised though, as Avory J. said,[77] it was 'impossible for the Court to do justice in this matter without creating a precedent, which may or may not be followed in the future when further argument may be heard'. This attempt to nullify the future binding effect of the precedent created was successful.

The Divisional Courts, in holding themselves strictly bound by a previous decision, have adopted the rule of the Court of

[69] *Harrison* v. *Ridgway* (1925), 133 L.T. 238, 239, Div. Ct. (Cnty. Ct. appeal), *per* Bankes and Scrutton L.JJ., *Fordree* v. *Barrell*, [1931] 2 K.B. 257, 260, C.A. (Div. Ct. appeal), *per* Scrutton L.J., *De Vries* v. *Smallbridge*, [1928] 1 K.B. 482, 486, C.A. (Div. Ct. appeal), *per* Scrutton L.J.

[70] *Grocock* v. *Grocock*, [1920] 1 K.B. 1, 11, 13, Div. Ct. (case stated), *per* Darling, Avory, and Salter JJ.

[71] *Hart* v. *Riversdale Mill Co., Ltd.*, [1928] 1 K.B. 176, C.A., in which Scrutton L.J. adopted (pp. 188, 189) the well-established rule in the House of Lords that the House is bound by a previous decision in which the House was equally divided. But Scrutton L.J. does not notice two occasions on which the Court of Appeal had expressed the opinion that it would not be bound in such circumstances: *The Vera Cruz (No. 2)*, 9 P.D. 96, 98, C.A., *per* Brett M.R., *Smith* v. *Lambeth Assessment Committee*, 10 Q.B.D. 327, 328, C.A., *per* Brett L.J.

[72] *Young* v. *Bristol Aeroplane Co., Ltd.*, [1944] K.B. 718, C.A., pp. 729, 730.

[73] *R.* v. *de Grey*, [1900] 1 Q.B. 521, Div. Ct., where a previous decision, given in a case in which the Court's attention had not been drawn to 'three strong authorities', was not followed.

[74] [1944] K.B. 427, Div. Ct.

[75] *Ibid.*, p. 431.

[76] *Re a Solicitor*, [1924] 1 K.B. 699.

[77] *Ibid.*, p. 700.

Appeal in preference to that of courts of first instance in which the judge is not absolutely bound by a previous decision of the same court. It has often been stated that the absolutely binding effect of precedent came to be accepted only in the nineteenth century. In the case of the Divisional Courts this stage in the history of judicial precedent was reached only in the twentieth century.

CONFLICTING PRECEDENTS

When precedents of a kind which are normally binding on the court are in conflict with one another, the obligation on the court, if any, is uncertain, although the problem is not a new one.[78] On this subject Romilly M.R. said[79]: 'I have usually not followed decisions of courts of contemporary co-ordinate jurisdiction in cases where such decisions have been contradictory to a long line of authorities, and I have thought that the early cases were right'. Pollock C.B. acted in the same way when presented with a similar conflict in the precedents, though he cautiously added[80]: 'I should have felt myself bound by the last authority upon the question of a court of co-ordinate jurisdiction, if the previous one had been adverted to and had been deliberately overruled'. In the same case Parke B. was in a minority in thinking that the single precedent should be followed rather than the earlier series of decisions. He confessed himself surprised at the case as 'being alike at variance with the previous authorities and with the words of the statute', nevertheless he concluded[81]: 'If the decision of the present case rested with me, I should act upon that authority as being the last upon the point, by giving judgment for the defendant, leaving the plaintiff to bring his writ of error. In this respect I differ from the other members of the Court'. When the conflict is a simple conflict between two contradictory decisions perhaps the court may be more readily allowed to exercise its untrammelled judgment. As Lord Abinger C.B.

[78] See the present writer's articles 'Conflicting Precedents' (56 L.Q.R. 457) and 'Precedent in Equity' (57 L.Q.R. at pp. 260–262).

[79] *Re Buller's Settlement* (1862), 8 Jur. p. 205.

[80] *Watts* v. *Rees* (1854), 9 Ex. 696, 700. As Platt B. put it (*ibid.*, 700, 701): 'In this conflict of decisions in the same court upon this statute, our judgment must necessarily conflict with one of them, for we have no other course open to us except to reject the one and follow the other'. According to the report in 23 L.J.Ex. 238 the Court was *bound* to follow the series of decisions: 'I feel myself bound by the weight of previous authorities' (*per* Pollock C.B., *ibid.*, p. 239): 'We ought to decide this point in conformity with a large series of decisions (*per* Martin B., *ibid.*).

[81] 9 Ex. p. 700.

said [82]: 'It appears to me very hard that where the decisions are at variance the party is to be bound by the last'. He followed the earlier case. The Divisional Courts, like other courts, have had to deal with several kinds of conflicts among the precedents.

(a) In *Broughton* v. *Whittaker* [83] a decision of a Divisional Court in the previous year was found to be in conflict with a series of three earlier decisions. The conflicting decision was not followed. Lawrence J. was able to distinguish it but he also said [84] that 'it ought not to be held by this Court as binding upon them to disregard the clear authority' of the three cases which preceded it. This remark does not make it clear whether or not the Court was strictly bound to follow the series of cases in question.

The same uncertainty in this situation exists in the Court of Appeal, as is shown by *Battersby* v. *Anglo-American Oil Co., Ltd.*,[85] in which there was 'a consistent line of authority' [86] on a certain point apart from one decision 'in conflict with the earlier cases' [87]: 'Accordingly, in conformity with the decision of the full Court of Appeal in the recent case of *Young* v. *Bristol Aeroplane Co., Ltd.*,[88] we are at liberty to disregard it, and, in our opinion, we ought to follow the earlier decisions'. This passage suggests that the series of precedents is not binding, but that the Court may choose to follow them; the word 'ought' would seem to refer to the legal content of the decisions. But when it was laid down in *Young* v. *Bristol Aeroplane Co., Ltd.*, that a conflict in the precedents is one of the exceptional cases in which the Court of Appeal is not bound by its own previous decision the Court was referring to a mere conflict between two precedents,[89] one on each side. When, however, the conflict is between one and many it seems reasonable that there should be no freedom of choice, but that the many ought to be followed. It has been observed [90] in connection with *Battersby* v. *Anglo-American Oil Co., Ltd.*, that 'if the reason on which the doctrine of the absolutely binding

[82] *Key* v. *MacKyntire* (1837), 5 Dowl. 463.
[83] [1944] K.B. 269.
[84] *Ibid.*, p. 275.
[85] [1945] K.B. 23.
[86] *Ibid.*, p. 29.
[87] *Ibid.*, p. 32, judgment of the Court *per* Lord Goddard.
[88] [1944] K.B. 718.
[89] *Ibid.*, p. 726: 'The Court is unquestionably entitled to choose between the two conflicting decisions'. 'The Court is entitled and bound to decide which of two conflicting decisions of its own it will follow' (*ibid.*, 729).
[90] 61 L.Q.R. 119.

nature of precedents is based is the need for certainty, then there would seem to be much to be said for a rule which would make the most recent decision of the Court the binding one'. The writer seems to have in mind a simple conflict between two cases rather than the kind of conflict which in fact existed in the *Battersby Case*. A series of decisions has always carried greater authority than a single decision; at one time a series of decisions was the only strictly binding authority. An explicit ruling is necessary before the binding effect of a series can be taken as being destroyed or even impaired by the presence of a subsequent inconsistent decision. It would seem to be the duty of the court which is presented with such a conflict to restore case-law discipline rather than to give way to the recalcitrant decision.

(b) When the conflict is between two series of decisions there is more reason for the court to be allowed an unfettered choice. In the Divisional Court in *Bowker* v. *Woodroffe*[91] there were two decisions on one side and two on the other, all of them being decisions of Divisional Courts. The Court followed the two decisions which Shearman J. said[92] had 'for a long time been regarded as the leading cases'; these two were the earliest and the latest of the four. In *Ratkinsky* v. *Jacobs*[93] there were two Divisional Court decisions on each side, but also a Court of Appeal decision supporting the earlier pair. On principle, it would seem that the decision of a higher court must be followed whatever conflicting co-ordinate decisions[94] there may be in addition on the point, yet Branson J. did not hold himself bound: 'There being, then, these two lines of authorities, which, to my mind, are inconsistent, it becomes my duty to express my own opinion on the construction of the statute, and to decide for myself the point raised'[95].

(c) A conflict between a Divisional Court decision and a decision of a judge of first instance presents no difficulty to a subsequent Divisional Court. As Denman J. put it in *Tancred* v. *Delagoa Bay Ry. Co.*[96]: 'When the decision of a single judge, whether hearing demurrers or sitting at Nisi Prius without a jury, conflicts with the decision of a Divisional Court, as in these two cases, I think that we, sitting as a Divisional

[91] [1928] 1 K.B. 217, Div. Ct.
[92] *Ibid.*, p. 226.
[93] [1929] 1 K.B. 24, Div. Ct.
[94] Cp. *Kinahan & Co., Ltd.* v. *Parry*, [1910] 2 K.B. 389 (*supra*, p. 260, n. 18), and authorities cited in 'Precedent in Equity' (*cit. sup.*) p. 261.
[95] [1929] 1 K.B. pp. 25, 26.
[96] 23 Q.B.D. 239, 242.

Court, ought to follow the decision of another Divisional Court in preference to that of a single judge '.

When there is a conflict between two Divisional Court decisions there is no obligation to follow either on a subsequent occasion. In this case Lord Alverstone C.J. held [97] that precedent had no binding effect: ' We have to choose between conflicting decisions '. A few years earlier Bigham J. had exercised a similar choice.[98] The freedom of choice still exists when there is a right of appeal from the Divisional Court to the Court of Appeal. In *Davies* v. *Bristow*,[99] a county court appeal in the Divisional Court, Lush J. said [100]: ' These two cases being in my opinion irreconcilable I feel at liberty to express my own views as to the correctness of the decision in ' the later case, and he approved of the earlier one. Shearman J. said [101] because the decisions were irreconcilable, ' the result is that this Court is at liberty to form its own opinion as to the correct principles to be applied '.

If this liberty of judgment now existed in the Divisional Courts generally and not merely when there is a conflict of authority it would be in accordance with an older and, it may be thought, a sounder practice than the present one.

W. H. D. WINDER.

[97] *Thompson* v. *Eccles Corp.*, [1904] 2 K.B. 1, 6, Div. Ct. (case stated).
[98] *Elliot* v. *Pilcher*, [1901] 2 K.B. 817, 822, Div. Ct. (case stated).
[99] [1920] 3 K.B. 428.
[100] *Ibid.*, p. 437.
[101] *Ibid.*, p. 440; the Court did ' not feel itself bound ' (p. 442).

AN ANACHRONISM IN THE BANKRUPTCY RULES

'I cannot help thinking' said Lord (then Sir Wilfred) Greene M.R. in *Re Muscovitch, Ex p. Muscovitch,* [1939] 1 Ch. 694, 696, 'that the language of the relevant bankruptcy rule' (rule 132 of the Bankruptcy Rules, 1915) 'is nowadays somewhat anachronistic, because it was introduced at a time when procedure was in many important respects different from what it is now. If and when the bankruptcy rules come up for reconsideration, this rule is one which might well be considered.'

The rule reads as follows:—

> 132. Upon entering an appeal, a copy of the notice of appeal shall forthwith be sent by the appellant to the Registrar of the Court appealed from, who shall mark thereon the date when received and forthwith file the same with the proceedings.

At first sight this looks as commonplace a matter of routine as can well be imagined. To appreciate its less innocent implications it is necessary to bear in mind that bankruptcy jurisdiction is exercised not only by the High Court (in Bankruptcy) sitting in Carey Street behind the Royal Courts of Justice, but also by numerous county courts all over England. Whether a particular bankruptcy takes place in the High Court or in one of these county courts depends solely on where the debtor resides or carries on business. It makes no difference whether the debts are £50 or £50,000, the powers of the county court are (subject to a few limitations that rarely apply) the same within its own jurisdiction as are those of the High Court itself, and the duties of the County Court Registrar in bankruptcy matters are in many important respects the same as those of the Bankruptcy Registrars in the High Court. This anomaly is, however, of comparatively modern origin. It dates back to 1869, when by the Bankruptcy Act, 1869, the old Country District Courts of Bankruptcy (which with the London Bankruptcy Court operated directly under the Lord Chancellor) were abolished and their powers were transferred to the county courts. At the same time the old London Bankruptcy Court under its Commissioners gave way to a new London Bankruptcy Court under a Chief Judge, which Court was a

few years later absorbed in the High Court of Justice by the operation of the Judicature Acts of 1873 and 1875.

Substantially the same rule as that now under discussion was brought into force in 1870 (Bankruptcy Rules, 1870, r. 144), at a time when all the Courts of Bankruptcy were still independent of the High Court of Justice and the entry of the appeal was 'the material step' in appealing in bankruptcy matters. After the Judicature Act, 1873 had the effect of bringing the London Bankruptcy Court within the High Court of Justice, and the subsequent Rules of Court, 1875 overrode the Bankruptcy Rules where there was a conflict (*Ex p. Viney*, 4 Ch.D. 794), it was held that in the High Court the emphasis was changed and that the service of the notice of appeal and not the entry was then 'the material step' (*Ex p. Saffery*, 5 Ch.D. 365). That was in 1877, and Sir George Jessel M.R. was a party to both of the last cited authorities. This did not, however, apply to the county courts, for in 1881, Sir George Jessel himself, in dismissing an appeal in the Court of Appeal in a case that originated in a county court, on the preliminary ground that Bankruptcy Rules, 1870, r. 144 had not been complied with said (*Ex p. Lamb*, 19 Ch.D. 169, 173): 'In the present case the appellant chose to enter his appeal on the very last day. He knew that the object of entering an appeal is that the other side may be able to ascertain whether there is to be an appeal or not. He knew that when it is a country case the appeal has to be entered with the Registrar of the county court. In other words, he knew the object of the rule, that in a country case the appeal must be entered in the country as well as in London, was that the respondent might have an opportunity of searching the register in the country.'

The facts in that case were that an appeal from the county court had been duly entered on a Friday afternoon. Three hours still remained before the last possible post went out on that day. The solicitors who entered the appeal duly prepared a copy of the notice for transmission to the County Court Registrar. They did not, however, trouble to catch the last post on that Friday, but sent off the notice by the first post on the Saturday. It was not suggested that anyone was in the least prejudiced by this. But as the rule requiring the copy notice to be sent 'forthwith' had not been literally complied with, it was held that that was fatal to the right to have the appeal entertained at all.

The explanation of this strictness seems to be that under the old rule (Bankruptcy Rules, 1870, rr. 143, 144) the practice had been to deliver a copy of the notice of appeal to each respondent four days before the day on which the appellant intended to move. Thus the sending of the copy of the notice to the Registrar was the only notice that the appeal had been brought which the respondents got when the appeal was entered.

Even that difficulty was, however, overcome and the last possible reason for the rule disappeared when by rule 134 of the Bankruptcy Rules, 1886 and 1890 the procedure as to appeals in bankruptcy was regulated by the provisions of R. S. C., O.58, which required that the notice of appeal should be served directly upon all the parties to the appeal. Thus a respondent now has notice served upon him as soon as the appeal is entered, and has therefore no need to search the file at all. Indeed, Lord Greene, speaking of a delay of three days in sending the copy notice, observed: 'What prejudice can be suffered by anybody as a result of the three days, or the two complete days, being allowed to expire between the entering of the appeal and the serving of the notice I cannot myself imagine.' (*Re Muscovitch, supra*, at p. 697.)

In these circumstances, it is somewhat unexpected to find that the Court of Appeal have twice held that even a short and innocuous delay in sending a copy notice to the Registrar is not only a failure to comply with the rule in that it does not amount to sending it 'forthwith', but is also a defect curable neither as an irregularity nor under the powers of the Court formally to extend the time.

The first of these cases was *Re Vitoria; ex p. Spanish Corporation*, [1894] 1 Q.B. 259. There, owing purely to the forgetfulness of a firm of solicitors, no copy of the notice of appeal had been sent to the Registrar at all. In vain it was pressed upon the Court that this was a mere oversight by which nobody was or could be prejudiced in the existing state of the practice of the Court. It was useless for counsel to ask for the matter to be dealt with as an irregularity or for the time for complying with the rule to be extended. Bluntly Lord Halsbury (at p. 264) declared: 'I think it would be wrong to hold that the dispensing power should be exercised when all that the litigant can say is, "my solicitor made a blunder and forgot to give the notice". No good reason for

laying down such a rule has been shown to us. The limits with respect to the time in which, under the rules, acts are to be done are, no doubt, subject to certain qualifications; but the circumstances must be special in order to justify the Court in granting relief. No such special circumstances are alleged to exist in the case now before us. The thing required by the rule to be done " forthwith " has not been done up to this moment. I am, therefore, of opinion that we ought not to dispense with the obligation to comply with the rule.'

It was this decision that the Court of Appeal in 1939 followed with reluctance in *Re Muscovitch*, *supra*. The Court there held that neither the Bankruptcy Act, 1914, s. 147 (1) nor rule 385 of the Bankruptcy Rules, 1915 could be invoked to cure a failure to comply with rule 132.

The sub-section referred to reads as follows :—

> 147 (1) No proceeding in bankruptcy shall be invalidated by any formal defect or by any irregularity, unless the Court before which an objection is made to the proceeding is of opinion that substantial injustice has been caused by the defect or irregularity, and that the injustice cannot be remedied by any order of that Court.

The rule in question reads :—

> 385. Non-compliance with any of these rules, or with any rule of practice for the time being in force, shall not render any proceeding void unless the Court shall so direct, but such proceeding may be set aside, either wholly or in part, as irregular, or amended, or otherwise dealt with in such manner and upon such terms as the Court may think fit.

Speaking in *Re Muscovitch*, *supra*, at p. 698 of rule 132, Lord Greene rounded off his observations on the effect of *Re Vitoria* by saying, 'This Court held that the rule means what it says and has to be complied with'. It does not, however, appear why rule 385 should not equally mean what it says. The operative words of that rule: 'Non-compliance with any of these Rules . . . shall not render any proceeding void unless the Court shall so direct . . .' would seem to mean nothing unless they mean that the failure to comply with any rule (*e.g.*, rule 132) shall be fatal only if the Court shall so direct. *Ex hypothesi* the rule has not been complied with, though what it means is not in question. What, then, is there to take it irrevocably out of the general saving provision, let alone to reverse the proposition and render the proceeding void?

The Court in deciding *Re Vitoria, supra,* rested its fundamental objection to curing the defect as an irregularity on section 104 (*d*) of the Bankruptcy Act, 1883, now replaced by section 108 (2) (*c*) of the Bankruptcy Act, 1914, which reads as follows:—

> 108 (2) (*c*) No appeal shall be entertained except in conformity with such general rules as may for the time being be in force in relation to the appeal.

It was pointed out that this struck at the root of the matter by positively depriving the Court of jurisdiction even to entertain an appeal so long as there was a non-conformity with any of the rules. But the logical conclusion of this proposition is surely somewhat startling. It must and can only mean that the Court to which an appeal normally lies is deprived of all power of curing technical defects involving even the most insignificant failure to conform with the rules, because to do so would be to 'entertain' the appeal. Unless it means this, there seems to be no intelligible ground on which section 108 (2) (*c*) should prevent the Court from curing as a mere irregularity a deviation from the rules which *ex concessis* can have done no imaginable harm to anyone.

There, however, the matter stands; with the result that in the present state of the law, a slip in an unfamiliar and quite unimportant point of procedure in the office of a harassed solicitor may well result in the hearing on its merits of a *bona fide* appeal being denied altogether, and may cause the rules, which were designed to ensure that procedure should never defeat justice, to be turned into an instrument of injustice. An unreported case of exactly this kind recently came before a Divisional Court sitting in Bankruptcy. The notice of appeal raised a number of questions of substance, one at least of which was of considerable importance in bankruptcy law and involved moreover a very substantial sum of money. Owing to an oversight on the part of someone in the office of the appellant's solicitors, no copy of the notice of appeal was sent to the County Court Registrar. In fact all parties concerned had full knowledge of the appeal. Proper notices had been served on the various respondents, and the Registrar himself knew at a very early date that the appeal was pending, both because he had been told so personally at the time when the order to be appealed from was being drawn up, and because the Judge's notes and a copy of the written judgment were asked for expressly for the purpose

of such appeal. A few days before the appeal was to be heard, and after all the costs of preparing for it had been incurred by both sides, the appellant's solicitors were advised that the objection was to be taken that the Court had no power to entertain the appeal. By that time it was, in the existing state of the law, hopeless to attempt to remedy the defect, and there was nothing for it but to submit to the appeal being dismissed with costs.

In the cases above discussed and also in other cases it has been held that a mistake by a solicitor or by counsel as to the meaning or application of a rule or an inadvertent omission to comply with a rule does not constitute 'special circumstances' such as would entitle the Court to exercise its jurisdiction under section 109 (4) of the Bankruptcy Act, 1914 as limited by rule 386 of the Bankruptcy Rules, 1915 (see *Re Muscovitch*, *supra*, at pp. 698, 699), and no doubt there are sound reasons of public policy for so holding. At the same time it is submitted that a more satisfactory way of applying sanctions to parties on whose behalf such mistakes have been made would be by depriving them of their costs or by ordering them, in more serious cases, to pay costs that would not otherwise have fallen upon them, rather than by shutting them out altogether from rights which bear no relation at all to the default in question.

Unfortunately, in face of the above cited decisions of the Court of Appeal, there is no tribunal short of the House of Lords that has the power to alter the law as it now stands; and still more unfortunately perhaps, unless by chance the point should arise in a High Court case there is no procedure whereby it can ever be brought before the House of Lords, for in cases originating in the county courts there is no appeal, even with leave, beyond the Court of Appeal. (Bankruptcy Act, 1914, s. 108 (2) (*a*).) But the principle involved is of much wider application than the particular Bankruptcy Rule under discussion. It demonstrates the disturbing possibility that even today justice may be choked by technicalities of procedure. Meanwhile it is at least desirable to draw attention again to the words of Lord Greene with which he concluded the passage cited in the opening paragraph above: 'If and when the bankruptcy rules come up for reconsideration, this rule is one which might well be considered.'

W. A. L. RAEBURN.

SPARE-TIME ACTIVITIES OF EMPLOYEES

AN ECONOMIST'S COMMENT ON *Hivac, Ltd.* v. *Park Royal Scientific Instruments, Ltd.*, [1946] 1 All E.R. 350

DR. KAHN-FREUND'S article [1] deals with three issues suggested by this most interesting case. (1) The duty of fidelity; (2) the effect of spare-time activities on the employee's work; and (3) statutory and other control of hours. They are best considered separately.

(1) THE DUTY OF FIDELITY

The case turned on this issue and this issue only, as the question of imparting confidential information, which was raised, was deliberately set aside as not being a part of the evidence.

Lord Greene stated the issue quite concisely ([1946] 1 All E.R. 350, at p. 356): 'As I see it, the Court stands in a sense between Scylla and Charybdis, because it would be most unfortunate if anything we said, or any other Court said, should place an undue restriction on the right of the workman, particularly a manual workman, to make use of his leisure for his profit. On the other hand, it would be deplorable if it were laid down that a workman could consistently with his duty to his employer, knowingly, deliberately and secretly set himself to do in his spare time something which would inflict great harm on his employer's business. I have endeavoured to raise the questions in the way that they appeal to me and, on the best consideration I can give to the matter, I think that the plaintiffs are *prima facie* right in this case.'

The legal duty of fidelity requires an employee not to work for a competitor where this would inflict great harm on his employer's business. There is no restriction on spare-time work if it inflicts no such harm, even if it is work for a competitor. For example, if the plaintiffs had been, not the sole manufacturers of hearing aids in this country, but one of a thousand equally small manufacturers, they would have been hard put to it to prove that their employees' action in helping to build up the 1,001st firm inflicted any substantial harm on their business.

[1] MOD.L.REV., Vol. 9, p. 145.

It is, therefore, of the essence of this case that the plaintiffs had a virtual monopoly of the market, which would be damaged by the emergence of a rival firm. Morton, L.J., makes this the first point on which his assenting judgment turns. But it is also of the essence that this monopoly depended on their having also a virtual monopoly of the special kind of skilled labour required for the manufacture of these instruments. If this had not been so the question would not have arisen. If this same kind of labour had been widely available in other industries, or if it had been unskilled labour, the plaintiffs could not have proved that they were harmed by the spare-time activities of their employees, for if these employees had not worked for the defendants, the defendants could easily have found similar labour elsewhere. To support the action there must be two monopolies: a monopoly of sale, and a monopoly of the particular type of labour, remembering that to an economist monopoly means not 100 per cent. control, but control sufficient to make possible some rigging of the market.

A hypothetical case will illustrate the point. Suppose that there is a firm engaged in merchanting trade with Abyssinia, and that it is the only such firm in this country. Suppose also that such trade must be conducted in Amharic, that there are only three typists with a knowledge of Amharic in this country, and that they are all employed by this firm, which also employs typists who do not know Amharic. None of the typists are confidential typists. Now suppose that a rival firm is started to do this trade, and that some typists of the first firm work for the second in their spare time. The decision in the *Hivac Case*, it seems to me, clearly refers only to the typists who know Amharic. The duty of fidelity does not prevent the others from working for the new firm in their spare time, because their employers would be no better off if they did not work for the rival firm, since the rivals would simply employ someone else. The decision in the *Hivac Case* is a decision that where a firm has a monopoly of which a monopoly of a special kind of labour is an essential part, the law will read into the contracts of that labour an obligation not to work for a competitor after hours.

As an economist I regret this decision. If a distinction is to be drawn between cases where there is a monopoly and

cases where there is none—and I have argued elsewhere [2] that this distinction is fundamental—then the public interest requires that the law should come down against the monopolist and not in his favour. The Court has taken the view that the damage the monopolist will suffer is the relevant consideration; the view of the economist is that the public interest is more important and that even if such a term were not implied, but expressed in writing, it should be void as being in restraint of trade.

Is it not extraordinary that the Courts should be willing to imply a limitation of spare-time activities only where it can be shown that such limitation is necessary to protect some private monopoly?

(2) THE EFFECT ON THE EMPLOYEE'S WORK

Dr. Kahn-Freund refers to the French authors Planiol and Ripert who seem to suggest that the employee should not do spare-time work because this robs him of his strength and prevents him from doing full justice to his employer's work. Here, of course, it does not matter whether the spare-time work is for a competitor, for some other industry, or on his own account; it need not even be work; on this view an employer could seek an injunction to restrain an employee from spending his evenings in night clubs, on the ground that this affected his work next day. We need not consider the point further. If an employer is dissatisfied with the quality of the work, he has all the usual remedies, and not many people would argue for an injunction to control spare-time activities on this ground.

(3) STATUTORY AND OTHER CONTROL OF HOURS

'The question arises', says Dr. Kahn-Freund, 'why it is that the law has done so little to protect the employee against the temptation of using his spare time for work instead of recreation', and he goes on to argue that it is desirable that the trade unions should perform this function. I profoundly disagree.

In the nineteenth century progressive public opinion favoured statutory and/or trade union control of hours and wages because employers were strong and workers weak. The aim was to prevent employers from using their strong bargaining position to force workers to work for longer hours

[2] Monopoly and the Law, MOD.L.REV., Vol. 6, p. 97.

or to accept lower wages than was desirable. The 'villain' of the piece was the employer, not the employee. Employees in general, it was felt, wanted shorter hours and more wages; if an individual employee wished to work longer hours, it was up to him to do so, provided only that his action was not injurious to his own health or the public safety (hence the provisions in coal mining and road transport Acts), and also that it did not undermine the position of other employees who did not wish to work such long hours.

Now, provided that people are paid full wages for any work they do above the normal hours (and *a fortiori* if they are paid heavy overtime rates), the position of other employees who do not work above the generally agreed hours is menaced only in two cases. One is if there is not enough work to go round. Everyone will agree that if enough work cannot be provided, what there is should be shared equitably, and arrangements to this effect are common, *e.g.*, in the Lancashire cotton industry.

The other case is where the extra work done improves the worker's knowledge and efficiency, and enables him to outdistance other workers. This is the case in my profession. Some of my hardworking and ambitious colleagues work sixty hours a week and produce several articles a year, thus acquiring an immense reputation. For my part I should like to work not more than ten hours a week, and to spend the remaining hours reading novels, lying in the sun, and otherwise enjoying life while it lasts. Alas, were I to do this I should get the sack, and my job be given to a more industrious man. If only my trade union, the Association of University Teachers, could enforce a rule preventing us from doing any academic work in what ought to be our spare time, how much easier life would be! But, as a democrat, I cannot agree that trade unions should control what their members do in their spare time. Provided that there is enough work for all who want to do eight hours a day, and that any work beyond that is paid at recognised rates, a man should be free to work as long as he likes.

W. ARTHUR LEWIS.

STATUTES

THE FAMILY ALLOWANCES ACT, 1945

THIS Act of twenty-nine sections is now in force, and any comment on it, however brief, must begin, where the debate on the third reading ended, with a tribute to the thirty odd years of work done for the cause of family allowances by the late Miss Eleanor Rathbone, M.P. (see in particular *The Disinherited Family* by E. F. Rathbone, 1927). It carries into effect the recommendations contained in paragraphs 50–59 of the White Paper on Social Insurance (Cmd. 1944, 6551) which embody, with considerable modifications, the suggestions made in paragraphs 410–425 of the Beveridge Report (Cmd. 1942, 6404).

The principal provision is for payment, out of the proceeds of general taxation and not of insurance contributions, of allowances at the flat rate of 5s. a week for every child, other than the eldest, who is under the upper limit of the school-leaving age or, as long as he is receiving full-time instruction in a school or is an apprentice, up to July 31 following his sixteenth birthday (sections 1 and 2). There is no means test, and the statute must be regarded as a milestone in the history of social reform. Nevertheless, it can only appear in its true perspective when the social insurance legislation strictly so called comes completely into force, when the school-leaving age has been raised to sixteen and when the provisions of the Education Act, 1944, are being fully carried out.

In the meantime there are some anomalies, due mainly to the piecemeal nature of English social insurance legislation to date, created by the provisions of sections 12–15 which apply the principle of 'no duplication of allowances' (Cmd. 1944, 6551, § 58). Section 12 prohibits any payment under the Act in respect of a child for whom an orphan's pension is being paid under the Widows', Orphans' and Old Age Contributory Pensions Act, 1936, with the somewhat unfortunate words that he 'shall not be treated as included in any family'; section 13 provides that, after the Act has come into force, supplementary allowances under the Workmen's Compensation Act, an increase in the weekly rate of benefits under the Unemployment Insurance Acts, or an additional allowance under the

Widows', Orphans' and Old Age Contributory Pensions Acts shall cease to be payable in respect of a child for whom a family allowance is being paid; section 14 deals mainly with the children of members of the forces, and section 15 provides for the reduction of family allowances where the claimant is entitled to outdoor relief or an unemployment allowance on the basis of a means test. The last two sections are only of temporary significance, and section 19 of the National Insurance Act deals with the apparent injustice occasioned by section 12 of this Act by providing for a guardians' allowance of 12s. a week, of which 5s. will come out of the proceeds of taxation. Many criticisms, however, have been made of section 13, but the questions involved are too controversial for comment in these pages.

Until the school-leaving age is raised to sixteen, there is the anomaly that parents who apprentice their son at the age of fourteen receive only 5s. a week, whereas, if he were to remain at school, they would indirectly get more than this because of the benefits conferred upon him in kind. The amount of these is said to justify the reduction of the 8s. weekly cash allowance suggested in the Beveridge Report (Cmd. 1942, 6404, § 425) to 5s. It is evident, however, that it may be some time before the provision of free meals, etc., can be adequately organised in all schools. Furthermore, one would like to know more about the practical administration of the Education Act, 1944, by local authorities before pronouncing an opinion on the extent to which the family allowances will operate as an inducement to parents voluntarily to keep their children at school beyond the present compulsory age. The cessation of the allowances at 16+, moreover, can only be viewed with equanimity if grants under section 81 of the Education Act, 1944, are liberally made, for the Act under discussion does nothing to remove what to many seems to be the anomaly that, whereas a rich parent is assisted by the State to keep his child at school beyond the age of sixteen because of the income tax allowance, a poor parent who is unable to receive the full benefit of this has no such assistance.

The Act is, of course, based upon the assumption that every parent should, while at work, be in a position to provide for one child who is below the earning age. A lawyer is hardly the appropriate person to comment on this in the light of current wage conditions, and he lacks the

necessary technique to enable him to forecast the effect of the Act upon wages in general, and, in view of the partial answer it affords to the argument that men have to provide for their children, on the demand for equal pay for men and women in particular. Still less can he venture an opinion as to the possible repercussions of family allowances on the birthrate. There are, however, certain matters of detail which come more specifically within the sphere of his work.

These are the provisions of sections 3 and 4, section 21 and the Schedule which deal respectively with the meaning of a 'family' for the purposes of the Act, the persons to whom the allowances are to be paid, and certain special cases. The allowances are payable 'for the benefit of the family as a whole' (section 1), but they 'belong', when the father and mother are living together, to the mother although they may be collected by either (section 4). They are, in every case, inalienable and immune from the operation of the Bankruptcy laws and of section 4 of the Debtors Act, 1869 (section 10). In the ordinary case, therefore, there is not likely to be much difficulty when the parents are together, and section 4 (3) and (4) deal with the exceptional case in which a Court of summary jurisdiction may direct, in domestic proceedings, that one of the parents is the only proper recipient of the payments. The allowances belong to a widower or widow living with and maintaining his or her children (section 3 (1) (*b*) and (*c*) and section 4). If a child is not living with its parents, they, or the survivor of them, are only entitled to the allowance if they are the principal contributors to the child's maintenance (section 3 (2) and Schedule, § 1). If the children are living with their parents or the survivor of them, but are being maintained by someone else, the conflict arising from the inclusion by section 3 in the definition of a family of children who are not the issue of but are maintained by the claimant to an allowance is resolved in favour of the parents by § 2 of the Schedule.

The application of the Act where the parents are divorced or separated may, however, lead to difficulty for, in many cases, § 3 of the Schedule leaves the question as to which parent is entitled to the allowance to be determined by agreement and, in default of this, by the Minister in his discretion. The provision would apply, for instance, where a father is paying maintenance under a Court order in respect of the children who are living with the mother. In

matrimonial cases which come before them, it might have been preferable to leave the matter to be determined by the Courts, for, in any case, they are likely to have to deal with difficult questions in relation to family allowances. Suppose, for example, that it has been determined by agreement or by the Minister that an innocent mother is to receive the family allowances, are the Divorce Registrars or the magistrates to treat them as part of her income for the purpose of determining the amount of maintenance payable by her husband in respect of the children living with her or, for that matter, of herself, for the allowances are 'for the benefit of the family as a whole'? What is to be the position if, in the case of a poor family, the husband takes the point that he should not be ordered to pay maintenance in respect of the younger children because the wife will then be entitled to family allowances under section 3 (1) (*c*) and section 3 (2) as the children are living with her? (It appears that this has already been done before one magistrate, see the *Solicitors' Journal*, July 20, 1946.) Views may well differ as to what the answers to these questions should be, but it is unfortunate that they are not provided by the Act.

Similar problems may also arise in connection with affiliation orders, for although section 21 (5) provides that an illegitimate child shall not be treated as the issue of its father, so that under § 2 of the Schedule and section 3 (1) (*c*) the mother is entitled to the allowance so long as the child is living with her, provided, of course, she has or is maintaining an elder child within the Act, the effect on the amount of the maintenance payable by the putative father is not mentioned. Where the child is not living with the mother, the family allowance goes, under § 1 of the Schedule, to the person who is making the principal contribution to its maintenance. However, the position with regard to the allowance should be readily ascertainable by the magistrates at the hearing of the application for an affiliation order and it is by no means clear that this will be so.

It may be noted that the Home Secretary in a letter to Clerks to the Justices (reported in the *Times*, August 5) has suggested that the fact that a woman is in receipt of a family allowance should not be regarded as a reason for reducing the amount of maintenance or affiliation payments to her, but that if in exceptional circumstances the allowance is being paid to the father it should be taken into account in deter-

mining what he can reasonably pay, the allowance being for the benefit of the family as a whole. This, however, is hardly a satisfactory solution of the above problems from the legal point of view.

In other respects the provisions of the Act appear to be fairly straightforward. Thus, legitimated children are treated as issue of their parents' marriage (section 21 (3)), and adopted children are to be treated as the issue of the adopter or adopters (section 21 (4)). The allowances payable in respect of such children are, therefore, governed, like those for children of parents who are not divorced or separated, by section 3, section 4 and §§ 1 and 2 of the Schedule. Stepchildren by a deceased spouse whose former marriage was determined by death are to be treated as the issue of the step-parents (section 21 (2)), so their allowances are governed by the provisions as to widowers and widows which have already been discussed. Section 11 excludes from any family for the purposes of the Act children who are detained on remand or under the care of a local authority, so no allowance is payable in these cases. Indeed, the Act is not one which is likely to come very much before the Courts, for section 5 empowers the Minister to deal with all questions as to the right to allowances, subject, where his discretion is not involved, to an appeal to referees. (Perhaps it is significant that this may involve the Minister in determining whether a man and wife shall be deemed to be living otherwise than together under section 21 (1) and so necessitate a decision as to whether there has been desertion, a somewhat novel matter for administrative ruling.) There is, however, a maximum penalty of imprisonment for three months and/or a fine of £50 for anyone who wrongfully obtains or attempts to obtain an allowance (section 9). By section 18 the consent of the Minister is required before a prosecution can be instituted, and the time limit is three months from the day certified by the Minister to be that on which, in his opinion, evidence sufficient to justify a prosecution came to his knowledge, or twelve months from the commission of the offence, whichever period last expires, another somewhat novel feature of the Act!

Three sets of regulations dealing respectively with the procedure on claiming allowances, persons entitled and references have already been made (S. R. & O., 1946, 137–139). They do not, however, call for comment, except that

it may be observed that the second of these, made under section 24, covering persons residing in the United Kingdom who are not British subjects born there, requires, in many cases, periods of residence or membership of the forces from fifty-two to 106 weeks as a condition precedent to a claim to an allowance. There may, therefore, be persons who have paid United Kingdom income tax on the basis of residence who are excluded from the benefits conferred by the Act.

As it is silent on the subject, the allowances under the Act are liable to tax. It is, therefore, something of a mathematical problem to calculate the exact extent to which an income tax payer with children is benefited. However, the anomalies occasioned by the provision of children's allowances in two different ways by two different Acts of Parliament, and by the giving by one Department of State of 5s. a week to be largely taken away by another, are matters which may be considered when, as will probably be the case within the next few years, a new family allowances Act comes to be drafted. The important point is that the principle has received legislative recognition.

RUPERT CROSS.

THE FINANCE (NO. 2) ACT, 1945, AND THE FINANCE ACT, 1946

BY these two Finance Acts, the country took its first steps towards a restoration of peace-time rates of tax. The purchase tax was abolished, or considerably reduced, for a large range of goods, mainly those concerned with the home; all income tax payers received some measure of relief while many of the lower paid groups were exempted altogether and, finally, industrial regeneration was encouraged by the reduction, and final abolition, of the Excess Profits Tax. The two Acts will now be considered in broad outline and as respects their more important provisions.

The Finance (No. 2) Act, 1945, reduced, as from April 6, 1946, the standard rate of income tax to 9s. in the pound while at the same time modifying the rates chargeable upon the first £125 of taxable income; personal allowances were restored to their pre-war level but, as a counterbalance, the Chancellor increased the rates of surtax, especially in the higher income brackets (sections 15–17). Excess Profits Tax was reduced to 60 per cent. as from January 1, 1946, while, so as to encourage the modernisation and re-equipment of business assets, provision was made for a 20 per cent. refund

of all Excess Profits Tax paid at the 100 per cent. rate. This Excess Profits Tax Post-War Refund was only to be paid where the taxpayer gave a strictly conditioned undertaking that the amount of the refund, less income tax, would be retained until it could be used in developing or re-equipping the business and provided that it was not used, either directly or indirectly, in a distribution of the profits of the concern to the proprietors thereof, which term includes shareholders (Part IV).

The provisions of the Income Tax Act, 1945, which provided for relief in respect of capital expenditure in the case of certain businesses and assets—see article at 8 MOD.L.REV. 243—became effective as from April 6, 1946 (section 18). By section 21 important alterations were made in the law relating to the accountability of local authorities to the Crown in respect of interest paid by them; this subject is highly technical but, in brief, the benefit of the decision in *Allchin* v. *Corporation of South Shields*, [1943] A.C. 607 is made available to *all* local authorities regardless of their having the necessary 'local Act', while sub-section (2) reverses the decision in *Attorney-General* v. *L. C. C.*, [1907] A.C. 131, and allows a local authority to set off tax paid by it on properties *in its own occupation* against tax due upon interest paid. Part V of the Act makes important changes in the law relating to 'Relief from Double Taxation'. Agreements for the avoidance of double taxation may be made with other countries by Order in Council, the relief being given by way of a credit, against British income tax due, of the appropriate foreign income tax paid; one such agreement, with the U.S.A., is implemented by S. R. & O. (2/8/46) No. 1327. By section 27 (5), Finance Act, 1920, any relief in respect of double taxation within the Commonwealth had to be passed on by a company to its shareholders, even where the latter were entitled to a dividend at a *fixed* rate as in the case of preference shareholders, see *South African Breweries, Ltd.* v. *Sheldrick*, [1923] 1 K.B. 173, a decision which has often been animadverted upon as unfair to the equity shareholders. Section 52 (2) of the Act repeals section 27 (5) and provides that tax at the *full* standard rate is to be deducted from all dividends instead of, as heretofore, only the reduced rate borne by the company; in effect only preference shareholders are damnified since the credit given for foreign tax will enure to the benefit of the ordinary shareholder by increasing the

profits available for distribution. By section 57 a similar credit for foreign duties is given as regards death duties.

The Finance Act, 1946, is especially noteworthy for the repeal of the Excess Profits Tax as from January 1, 1947 (section 36); this tax has been strongly criticised as a clog on enterprise by reason of its penalisation of new businesses with no pre-war standard of profits. Elaborate provisions, contained in Part IV of the Act, deal with the terminal and rehabilitation expenses which may be deducted in the final settlement of the Excess Profits Tax, while relief, somewhat similar to that afforded on the termination of the Excess Profits Duty in 1920, is granted in respect of losses due to any fall in the value of stock after the end of 1946 (sections 38–39 and Schedules VIII and IX). The Chancellor of the Exchequer, during the debates on the Finance Bill, hinted on more than one occasion that he was considering a substitute tax on business profits in lieu of the Excess Profits Tax; in view of the obvious difficulties at which he hinted it is probable that this will be effected by a stepping up of the rate of tax—now five per cent.—of the 'Profits Tax', as the existing National Defence Contribution has been renamed (section 44).

In the field of Income Tax, the features most appreciated by the general taxpayer will be the increase in the earned income relief to one-eighth in place of one-tenth (section 24) though this is restricted to a maximum of £150, and also the commencement of the repayment of Post-War Credits—see note thereon at 5 MOD.L.REV. 129—but this is only allowed for the first three years and as respect men over sixty-five and women over sixty (section 26). The Chancellor justified the restriction of the increase of the earned income relief by a desire to benefit the lower paid income groups although he foreshadowed an extension in the next budget; the relief is not effective until the second half of the financial year. It is clear that, if inflation is to be avoided, there could not be a *general* release of Post-War Credits, especially as the sum involved exceeds £800,000,000; the Chancellor is probably keeping such a release 'up his sleeve' so as to ensure 'full employment' when consumer goods are in ample supply but credit is short. One further loophole in 'legal evasion' of surtax is closed up by section 28 which prohibits, in certain circumstances, the deduction for the purposes of that tax, of annual sums paid under settlements; this is aimed especially

at the type of case exemplified in *Duke of Westminster* v. *Inland Revenue Commissioner* (1934), 19 Tax Cas. 490 (H.L.), where the taxpayer settles annual payments upon his employees in lieu of wages. The section also deals indirectly with the so-called 'charity ramp' whereby a taxpayer in the higher income brackets himself contributes only a small percentage of any sums paid by him to a charity under the well-known 'seven year covenants'.

Sections 31 and 61 are unique in the history of our tax legislation for they reverse, in favour of the taxpayer, immediately prior decisions of the House of Lords against him. The practice of the Crown in rendering nugatory by legislation decisions of the highest appellate Court adverse to the Inland Revenue is well known, see in particular the Finance Act, 1940—noted at 4 MOD.L.REV. 136—which nullified no fewer than five such decisions! Section 31 deals with the so-called 'double taxation' of foreign dividends—see article at 9 MOD.L.REV. 84—and restores, as respects *ordinary* dividends, the law laid down in *Gilbertson* v. *Ferguson* (1881), 7 Q.B.D. 562, which was overruled. after some sixty years, by the House of Lords in *Selection Trust, Ltd.* v. *Devitt*, [1945] 2 All E.R. 499. Section 61 reverses *retrospectively* the decision in *Pontypridd and Rhondda Joint Water Board* v. *Ostime*, [1946] 1 All E.R. 668, by enacting that sums received by a joint authority from its constituent authorities in order to meet deficits shall be deemed *never* to have been 'trading receipts' for the purpose of the Income Tax Acts. It may be asked why the Crown should have resisted the taxpayers' claims in these cases right up to the House of Lords and then have *immediately* undone its success by legislation. The answer seems to be that it was essential that certain general principles of income taxation should be recognised as immutable, *viz.*, as regards section 31, that there is no *general rule* against 'double taxation' implicit in the scheme of the Income Tax Acts and, as respects section 61, that the 'mutual principle' involves the *complete* identity of both contributor and participant; once these principles were recognised as law, then there was scope for mitigation in their application to *particular* types of cases. A minor but revolutionary step is taken by section 62 which abolishes the office of assessor of income tax and land tax; this office can be traced back in an unbroken line to the Land Tax Act, 1698! The functions, such as they have been in recent years,

exercised by the assessors are now transferred to the inspector or collector of taxes.

Noteworthy alterations in the law relating to the Death Duties are also made by the 1946 Act. Estates below £2,000 in value are exempted altogether (section 46 and Schedule X) —the present limit of exemption is £300—and the power of the Inland Revenue Commissioners, under section 56, Finance (1909–10) Act, 1910, to accept property in satisfaction of the duties is extended (section 49). In his Budget speech the Chancellor undertook to set up a National Land Fund to deal with land transferred in satisfaction of death duties and other land acquired by the State; sections 48 and 50 give effect to this undertaking. The period in which gifts *inter vivos* attract liability to estate duty is extended from three to five years (section 47 and Schedule XI). The remaining provisions of the Act deal with highly technical matters hardly proper for discussion in the pages of this Review, but we may briefly note section 52 which exempts from the Stamp Duties all documents connected with schemes for the nationalisation of industry.

A. Farnsworth.

REPORTS OF COMMITTEES

First Interim Report of the Committee on Procedure in Matrimonial Causes (the Denning Committee). Cmd. 6881/46

The Denning Committee were appointed on June 26 to report on what procedural reforms are required in matrimonial causes and to recommend methods by which the existing delays might be eliminated. With a promptitude which other Committees and Royal Commissions might well emulate, they presented their first interim report only a month later, having then held five meetings, heard oral evidence from thirteen witnesses and considered a number of memoranda. The necessary order to implement their recommendations was promulgated on July 31 and came into operation on August 6 (the Matrimonial Causes (Decree Absolute) General Order, 1946, and the Matrimonial Causes (Amendment) (No. 2) Rules, 1946, S. R. & O.s, 1946, 1305/L.15 and 1304/L.14).

Their interim recommendations were two in number, of which the first was of the greatest social consequence. It was, of course, that the period between decree *nisi* and decree absolute should be reduced from six months to six weeks.

The Committee pointed out that the sole object of the delay is to enable the King's Proctor or a member of the public to show cause why the decree should not be made absolute by reason of its having been obtained by collusion or suppression of facts; it is not intended as a test of the petitioner's morality or to give an opportunity of reconciling the parties. Hence the delay can only be justified, if at all, in the comparatively few cases where investigation is required. These cases are of three categories:—

(1) Where the case is specifically referred to the King's Proctor by the Judge before he pronounces a decree *nisi*. In this case the delay fulfils no purpose because the investigation will have been carried out before decree *nisi*.

(2) Where the petitioner applies for expedition. These cases constituted a large part of the work of the King's Proctor but were often not in so great need of investigation as others, since a petitioner is unlikely to invite investigation unless his conduct bears it. Cases under this category would be reduced if the delay were also reduced, thus enabling the King's Proctor to concentrate on the third category.

(3) Cases in which after decree *nisi* a member of the public gives information to the King's Proctor or which the King's Proctor selects for investigation. It is difficult to justify holding up all genuine cases merely because of the small minority which require investigation and the Committee concluded that six weeks will give him sufficient time to select cases for investigation; he need not complete the investigation within that time but can always keep the matter open by entering an appearance in cases where he requires more time.

Hence the Committee recommended that the period should be reduced from six months to six weeks, this period being sufficiently long to enable the King's Proctor to fulfil his function but not so long as to be an undue burden on the innocent petitioner, and also being the time limited for an appeal.

This decision will give universal satisfaction. As Sir Alan Herbert has constantly pointed out, although six months may not seem a long time to an outsider, it may be an unconscionable time to parties who have already waited years. Although the public interest may demand that the ties of matrimony should not lightly be discarded, once the marriage has completely broken down and the offence of the respondent has been declared by the Court, it is obviously in the interests

of the parties, the children, the public, morality and the birth rate that the wrecked marriage should be legally dissolved as rapidly as possible and that the parties should be free to start anew. The only possible criticism of the recommendation is that which has already been made by Sir Alan Herbert, namely, that it does not go far enough and that the interval should be abolished entirely. The Committee do not reject this possibility, they reserve it for consideration in their final report since it would require legislation. On this point it may be noted that while steps are obviously required to ensure that the parties do not remarry while there is still a possibility of an appeal or intervention, this point is already covered by the regulations which forbid remarriage while there is a subsisting right of appeal (Jud. Act, 1925, s. 184 (1)).

The recommendation of the Committee is so obviously right that it draws attention once more to the unfortunate reluctance of the legal profession to introduce reforms on its own initiative. The Judicature Act, 1925, merely provided that the period of delay should be six months 'unless the Court by general or special order from time to time fixes a shorter period'. Hence the reform could have been introduced at any time by a Rule of Court and the alteration is so simple that it has, in fact, been made by an Order coming into operation within a week of the recommendation. Yet it needed the setting up of a special committee to effect a reform that every lawyer knew was required. Lawyers are accustomed to disclaim responsibility for harsh laws and to blame them on the Legisature, but this is but one example of the many simple but important reforms that the profession itself could effect by the use of a little imagination and initiative.

The question has been raised as to the effect of the new rule on applications for decree absolute by the respondent in default of action by the petitioner. The Judicature Act, 1925, s. 183 (3) (added by the Matrimonial Causes Act, 1937) provides that where the party who obtained the decree absolute does not apply to make it absolute, the other party may do so after the expiration of three months from the earliest date on which the application could have been made by the party who obtained the decree. It therefore follows that in the case of decrees *nisi* made before August 6 the application by the guilty party can now be made after three months from six weeks after decree *nisi*, or three months after August 6 if the decree *nisi* was made more than six weeks before that date.

In the case of future decrees the three months period will start to run six weeks after decree *nisi*. There has been no reduction in the period of three months and any such reduction would require legislation, but a corresponding reduction from three months to three weeks might well be considered by the Committee for their final report if this does not recommend the complete abolition of the decree absolute.

The second recommendation is of less importance, except to overworked solicitors. It is the abolition of the former practice under the Matrimonial Causes Rule 40 whereby the petitioner's solicitor had to search in a book to ensure that an appearance had not been entered in opposition to the decree being made absolute. This was a pointless waste of the time of solicitors and the Divorce Registry since the officials of the Registry had in any case to make a separate search themselves. This latter search will now suffice without solicitors being troubled at all.

The introduction of the new rules has been accompanied by the adoption of a further revision of practice by the Registry, which now issues a photostat copy of the decree absolute on the same day as it is made, thus obviating the former delay of several more days before a copy was obtainable.

We eagerly await further reports by the Committee. If they continue to tackle their problem with the speed and determination that they have already shown they will earn the thanks of the profession and the blessings of that all-too-large section of the public whose marriages have been wrecked.

L. C. B. G.

RENT CONTROL IN ENGLAND AND WALES

THE attention of our readers is drawn to the Memorandum (C. 133) published under the above title by the Ministry of Health (H.M. Stationery Office, 3d. net.). Its object is expressed to be to answer some of the questions on the Rent Acts often put to the Minister—and one can sympathise with his desire to avoid questioning on this difficult topic. It only sets out briefly to summarise the various statutes and regulations and not to deal with detailed points of doubt or difficulty. In consequence it is designed for the layman rather than the lawyer, and the extent of public interest in this topic and of the demand for explanatory matter is shown by the fact that the London Stationery Office's initial stock of the memorandum was exhausted on the morning of publication.

Even to the lawyer it is a useful *aide memoire* since it contains an epitome of all the legislation under which rents are controlled —the Rent Restriction Acts, Defence Regulation 68CB, the Building Materials and Housing Act, 1945, and the Furnished Houses (Rent Control) Act, 1946—with references to the section concerned.

Perhaps its most remarkable feature is the exhortation, stressed in the preliminary summary and oft-repeated in the text, to consult a solicitor in all cases of difficulty or doubt. No one can question the wisdom of this advice (or the likelihood of difficulties and doubts) but it is somewhat pathetic that it should need such emphasis in connection with legislation primarily intended for the protection of the working classes. And what makes it more pathetic is the fact that it is beyond their means to act on the advice in the majority of cases and will remain so until the recommendations of the Rushcliffe Committee are implemented. Local authorities try to be helpful but they cannot be expected to give invariably accurate advice on this branch of the law, depending as this does on the correct interpretation of a maze of statutes obfuscated with a plethora of judicial decisions. For legal guidance the poor are dependent on such help as can be given by Poor Man's Lawyer Centres—in the few towns where these exist.

This Memorandum will be of some assistance to landlords and tenants in ascertaining their obligations and rights—but until the law is codified and consolidated and legal advice is freely available for all, the Rent Acts will remain too often a sword of Damocles hanging over the landlord rather than a shield for the tenant. In the meantime this memo. is about as good as it could be and the Ministry are to be congratulated upon it.

NOTES OF CASES

NEGOTIABLE INSTRUMENTS, ESTOPPEL, NON EST FACTUM AND FICTIONS

Wilson and Meeson v. *Pickering*, [1946] 1 K.B. 422.

IN *Wilson and Meeson* v. *Pickering*, [1946] 1 K.B. 422, a partner in the plaintiff firm signed, on its behalf, a blank crossed cheque marked 'not negotiable', and handed it to a secretary with instructions to complete it in favour of the Commissioners of Inland Revenue for £2. The secretary fraudulently inserted the name of the defendant as payee, and drew the cheque for £54 4s. 0d. She then gave it to the defendant in payment of a private debt, and the cheque was duly met. The Court of Appeal held that the plaintiffs were entitled to judgment for £54 4s. 0d. because section 81 of the Bills of Exchange Act, 1882, which provides that a person who takes a crossed cheque marked 'not negotiable' shall not have a better title to it than the transferor, applies to an original payee, and because the plaintiffs were not estopped from alleging that the defendant's title to the cheque was defective.

Although this appears to be the first decision on the point, the judgments of the Master of the Rolls and Morton, L.J., do not call for comment so far as the construction of section 81 of the Act of 1882 is concerned. Morton, L.J., points out (at p. 480) that, as a rule, the drawer's object in marking a cheque 'not negotiable' is to ensure that it is not cashed by anyone except the payee. However, the conclusion that the latter is included in the wide wording of the section seems to be inevitable.

On the question of estoppel, the defendant relied on *Lloyd's Bank, Ltd.* v. *Cooke and others*, [1907] 1 K.B. 794, upon the authority of which the County Court Judge had decided in her favour. In that case, the defendant C. had been negotiating for a loan from the plaintiffs who required collateral security. The defendant S. therefore signed his name on two blank stamped pieces of paper and authorised C. to complete each of them as a promissory note for £250 payable to the plaintiff. C. fraudulently completed one of the documents as such a note for £1,000 which sum was advanced to him by the bank to whom S. was held liable

by the Court of Appeal on the basis of a common law estoppel.

As the law then stood, it had not been authoritatively decided that the payee of a bill or note is not a holder in due course (*Jones* v. *Waring and Gillow*, [1926] A.C. 670, at p. 680, may now be taken to have settled this point), but the Court of Appeal were not prepared to overrule the decision of the Divisional Court in *Herdman* v. *Wheeler*, [1902] 1 K.B. 161, that he was not. The facts of *Herdman's Case* was similar to those of *Lloyd's Bank* v. *Cooke*, but it was argued exclusively on the construction of the Bills of Exchange Act, 1882. After conferring a *prima facie* authority to complete a stamped piece of paper which is signed in blank and delivered in order that it may be converted into a bill, section 20 of this Act goes on to provide that only a holder in due course can enforce the instrument, against those who become parties prior to its completion, if it is not filled up strictly in accordance with any authority which is given. *Herdman* v. *Wheeler* was, therefore, decided in favour of the defendant.

In these circumstances, it would be surprising to find that the estoppel upheld in *Lloyd's Bank* v. *Cooke* was based on the fact that the document involved was, unlike that in *Wilson and Meeson* v. *Pickering*, a negotiable instrument, and it is submitted that this was not the ground of the decision. Collins, M.R., said ([1907] 1 K.B. at p. 802) 'at common law there is an effectual estoppel against a person who, like the defendant S., has entrusted an agent with securities for the purpose of obtaining, on the faith of them, an advance of money up to a certain amount, even though the agent uses them as a means of obtaining a larger advance'. Later (at p. 803) he doubts whether an estoppel could have been set up in *Herdman's Case*, and he could hardly have done so if that about which he was speaking was founded upon the negotiable nature of the security upon which he held the defendant liable. It seems, therefore, that *Lloyd's Bank* v. *Cooke* was decided on estoppel by representation of agency, and it was so treated by Lord Sumner in his speech in *Jones* v. *Waring and Gillow*, [1926] A.C. 670 at p. 693.

This is why it is regrettable that the primary reason given by the Court of Appeal for distinguishing *Wilson and Meeson* v. *Pickering* from *Lloyd's Bank* v. *Cooke* was that the cheque

in the former case was marked 'not negotiable'. Lord Greene, M.R., says ([1946] 1 K.B. at p. 427) 'the rule that a person who signs an instrument in blank cannot be heard as against a person who has changed his position on the faith of it, to assert that the instrument as filled in is a forgery or that it was filled in in excess of the agent's authority, is confined to the case of negotiable instruments'. Similarly, Morton, L.J., speaking of the judgments in *Lloyd's Bank* v. *Cooke*, says (at p. 430) 'each member of the Court laid stress on the negotiable character of the document'. They did, but not, it is respectfully submitted, as part of the *ratio decidendi*. Their concern was to show that, the fact that the promissory note had not been negotiated to the plaintiff so as to make him a holder in due course within what *Herdman* v. *Wheeler* had decided to be the meaning of the Bills of Exchange Act, 1882, did not prevent an estoppel from arising. Fletcher Moulton, L.J., went further, but his *dictum* to the effect that the plaintiff must be treated as a holder in due course ([1907] 1 K.B. at p. 805) was *obiter* and no longer represents the law.

It is therefore submitted that, at any rate since the decision of the House of Lords in *Jones* v. *Waring and Gillow* (*supra*), the rights of the original payee against the drawer of a cheque, the maker of a promissory note, or the acceptor of a bill of exchange must be determined, where necessary, by the principles of the common law as to estoppel and not by the rule of the law merchant which treats these instruments as currency in the hands of a holder in due course. The latter is one to whom they have been negotiated, but the exclusion of an original payee may not have effected any change in the law on the point under discussion. For instance, Byles, J., in the passage from his judgment in *Swan* v. *The North British Australasian Co., Ltd.* (1863), 2 H. & C. 175, 184, 185, quoted by Lord Greene, M.R. ([1946] 1 K. B. at p. 427), confines his remarks as to honest acquisition conferring title to bills and notes made or become *payable to bearer*. Again, in *Foster* v. *Mackinnon* (1869), 4 C.P. 704 at p. 712, when speaking of the liability as acceptor of one who signs his name across the face of a blank stamped bill which has been improperly completed, he restricts it to cases in which the instrument has passed to an innocent *indorsee* for value. At any rate, it is now difficult to see upon what principle a different rule of estoppel can apply between

maker and payee of a promissory note and drawer and payee of a cheque marked 'not negotiable'. Each case depends upon the ordinary law of contract and agency.

The foregoing criticism does not, of course, affect the other reasons given by the Master of the Rolls, with the concurrence of Morton, L.J. (at p. 431), for holding that there was no estoppel in *Wilson and Meeson* v. *Pickering*. These were (i) that no duty was owed by the plaintiffs to the defendant, (ii) that the real cause of the receipt of money by the defendant was the secretary's forgery, and (iii) that the defendant had not acted to her prejudice on the faith of the alleged representation of the secretary's authority ([1946] 1 K.B. at pp. 425–6). All of them, however, would have applied if the cheque had been negotiable, and none of them would have applied in *Lloyd's Bank* v. *Cooke*. In that case, there was a representation of authority and a causal connection between it and the advance made by the bank, and (*per* Lord Greene, [1946] 1 K.B. at p. 425), the bank made an advance on the faith of the representation.

The fact that one reason why the results of these two cases were different was the necessity of proving prejudice in order to raise a common law estoppel in pais, upon which, it is suggested, they each fundamentally depend, indicates the importance of distinguishing this doctrine from that of the law merchant under which honest acquisition confers title. The latter is codified, so far as blank instruments are concerned, by the proviso to section 20 of the Bills of Exchange Act, 1882, and, 'to this despotic but necessary principle, the ordinary rules of the common law are made to bend' (*per* Byles, J. (1863), 2 H. & C. at p. 184). A holder in due course does not have to prove prejudice in order to succeed in an action on an improperly completed bill which has been signed and issued in blank, and he is none the less a holder in due course because he takes it in payment of a past debt.

The distinction between common law estoppel and that which may be raised by the mercantile rule that honest acquisition confers title appears to have an important bearing on the vexed question of the relevance of negligence to the plea of *non est factum*. With all respect to those who take the contrary view (*e.g.*, Cheshire & Fifoot, *Law of Contracts*, 161), the judgment of Byles, J., in *Foster* v. *Mackinnon* (1869), 4 C.P. 704, does not involve the proposition that

negligence estops a person from relying on this plea when it could otherwise be raised at common law. All that he says is that it *may* do so and the reason for his hesitancy is not far to seek. When speaking (at p. 712) of the earlier case of *Swan* v. *North British Australasian Co.* (1863), 2 H. & C. 175, he says 'it has recently been decided in the Exchequer Chamber that, if a deed be delivered and a blank left therein were afterwards improperly filled up (at least if that be done without the grantor's negligence), it is not the deed of the grantor'. In *Swan's Case*, the same learned Judge had (at pp. 185–6), like Cockburn, C.J. (at p. 190), expressed the view that the plaintiff was not negligent. The qualifications with regard to negligence in his enunciation of the principle of *non est factum* in *Foster* v. *Mackinnon* (at p. 711), were, therefore, nothing more than a precautionary measure.

Swan's Case has since been authoritatively treated as having been decided for the reasons given in the frequently quoted passage from the judgment of Blackburn, J. (4 C.P. at p. 182)—'the neglect must be in the transaction itself, and be the proximate cause of leading the party into that mistake, . . . it must be the neglect of some duty that is owing to the person who is led into that belief' (see, for example, *London Joint Stock Bank* v. *Macmillan*, [1918] A.C. 777 at p. 836). As Byles, J., had said ((1863), 2 H. & C. at p. 184) 'the position that mere negligence of an alleged grantor may estop him from showing that an instrument purporting to be his deed is not his deed seems to me both novel and dangerous', it is hardly likely that he was laying down what is said to have been settled law prior to 1911 in his references to negligence in *Foster* v. *Mackinnon*, unless there is some obvious reason why negligence in relation to the signature and delivery of a complete as contrasted with a blank document should raise an estoppel.

It is submitted that the attempt to distinguish *Swan's Case* from *Carlisle and Cumberland Banking Co.* v. *Bragg*, [1911] 1 K.B. 489, on the ground that the former simply decided that the plaintiff was not responsible for the consequences of his broker's forgery (Cheshire & Fifoot, *op. cit.* 163) fails to take account of the fact that one ground of the decision was that no duty was owed by the plaintiff to the defendant. Similar objections apply to the attempted distinction founded on the intervening larceny of Swan's broker (XXVIII, L.Q.R. 190), and it appears that the judgment in *Foster* v. *Mackinnon*

'must be read as specifically referring, so far as it turns on negligence, to the case of a negotiable instrument' (*per* Kennedy, L.J., [1911] 1 K.B. at p. 497).

A holder in due course of such an instrument must prove that it was signed by the defendant, and, as *Foster* v. *Mackinnon* shows, he is liable to be defeated on this point by the plea of *non est factum*. However, as his claim is derived from a system of law under which honesty confers title and past consideration is good consideration, it is not surprising that an estoppel by negligence may be raised in his favour where it is not raised by the common law, founded as it is on the maxim *nemo det quod non habet* and under which detriment is essential to raise an estoppel in pais.

Bowmaker, Ltd. v. *Wycombe Motors, Ltd.*, [1946] 2 All E.R. 113.

The effect of the common-law doctrine as to title is strikingly illustrated by the decision of the Divisional Court (Lord Goddard, C.J., Humphreys and Singleton, JJ.) in *Bowmaker, Ltd.* v. *Wycombe Motors, Ltd.*, [1946] 2 All E.R. 113. In that case, it was held that a garage proprietor was not entitled to exercise his artificer's lien, as against the owner, on a car which had been subject to a hire-purchase agreement. His contract with the hirer to effect the repairs in respect of which the lien was claimed had, presumably, been made in ignorance of the fact that the hire-purchase agreement had been determined some days previously. When it was left at the garage, the hirer 'had no right or title to the car whatsoever' (*per* Lord Goddard, C.J. at p. 114).

The agreement contained a prohibition on the creation of a lien by the hirer but that would not have been fatal to the repairer's case. 'The owner, leaving the cab in the hands of a man entitled to use it, gives him an implied authority to have it repaired with the resulting lien for repairs', and, 'if a man is put in a position which holds him out as having a certain authority, people who act on the holding out are not affected by a secret limitation of which they are ignorant' (*per* Scrutton, L.J.—*Albemarle Supply Co., Ltd.* v. *Hind & Co.*, [1928] 1 K.B. 307 at p. 317–8).

However, in the *Bowmaker Case*, the car was not, at the material time, in the hands of a man entitled to use it, and, although the precise point involved was only impliedly covered by the authorities cited, it is respectfully submitted

that the decision is clearly right. Nevertheless, it is unlikely that the conflicting principles of *nemo det quod non habet* and *possession vaut titre* have been permanently and perfectly reconciled by English law, and it will, no doubt, be suggested that the case under discussion indicates the need for legislation. Section 2 (2) of the Factors Act, 1889 was passed in order to obviate the effects of the corresponding decision with regard to a sale by a factor whose authority had been revoked (*Fuentes* v. *Montes* (1868), 4 C.P. 93), but much information would be required before an opinion could be formed as to the merits of a garage proprietor's claim to protection similar to that afforded by the above enactment to those dealing with mercantile agents.

Gillman v. *Gillman* (1946), 174 L.T. 272.

The previous excursion into the realms of *non est factum* is perhaps justified by the fact that it has recently been considered by a Divisional Court (Lord Merriman, P., and Byrne, J.,) in *Gillman* v. *Gillman* (1946), 174 L.T. 272. In that case a wife had been found by the magistrate, who held that her husband was guilty of desertion, to have signed a separation deed, which would otherwise have been fatal to her allegation, without knowing what she was doing. The husband's appeal on this point was allowed, for, as Lord Merriman, P., pointed out (at p. 273), the finding that the wife did not know what she was signing was ambiguous. He concluded that the plea of *non est factum* failed, whether the wife knew the class of document she was signing but was ignorant of its contents, or whether she was unaware of the class of document and did not seek to find it out. It may be said with respect that this conclusion is unimpeachable. On the first assumption, the case is covered by *Howatson* v. *Webb*, [1908] 1 Ch. 1, and, so far as the second is concerned, it is difficult to see how the plea of *non est factum* could prevail if the wife was unable, as she apparently was, to say what she thought she was signing. The plea must be restricted to cases of mistake as to identity, and, even where there is blindness or illiteracy, the written contract must be 'of a nature altogether different from the contract pretended to be read from the paper which the blind or illiterate man afterwards signed' (*Foster* v. *Mackinnon* (1869), 4 C.P. 704 at p. 711 *per* Byles, J.).

There are, however, passages in the judgment of Lord Merriman, P., which suggest that the plea of *non est factum*

can only be raised where the mistake has been occasioned by fraud, duress, blindness, illiteracy or the fact that the document in issue is in a foreign language. It is true that, in the *dictum* of Cotton, L.J., in *National Provincial Bank* v. *Jackson* (33 Ch. D. 1 at p. 10), cited by the learned President in *Gillman* v. *Gillman* (at p. 273), it is assumed that the person who signs a release while intending to execute a lease is misled by the misstatements or misrepresentations of the person procuring the execution of the deed. Nevertheless, it seems that Byles, J., contemplated the possibility of the plea in question succeeding where there was no fraud—the signature ' is invalid not merely on the ground of fraud where fraud exists, but on the ground that the mind of the signer did not accompany the signature ' (4 C.P. 711).

In practice the number of cases where *non est factum* could succeed in the absence of fraud or one of the other causes of error mentioned by Lord Merriman, P., must be few indeed, however, it is difficult to find any theoretical reason why the plea should not be available in their absence. If, for instance, in *Lewis* v. *Clay* (1898), 67 L.J.Q.B. 224, Lord William Nevill had thought the documents whose signature he procured to be what he said they were, but made an improper use of them later, the defendant would still surely not have been liable on the promissory notes. The mistake assumed is as to the identity of the documents and, fraud or no fraud, to enforce it, would be ' imposing upon the defendant a contract different from that which he entered into ' (*per* Martin, B., in *Raffles* v. *Wichelhaus* (1864), 2 H. & C. 906 at p. 907). The case in which this remark was made was one of mistake as to the identity of the subject matter, but it is precisely the reason why the *non est factum* plea has been allowed in the past.

In short, the writer respectfully agrees with the statements on this subject in § 79 of Salmond and Williams on *Contracts*. It is submitted that *non est factum* can be pleaded ' even against the other party who was wholly ignorant of any such error and even against an innocent and ignorant assignee of the contract ' (at p. 213). It is also submitted that negligence is irrelevant ' except possibly in the case of negotiable instruments passing into the hands of holders in due course who are put into a favoured position by statute ' (p. 214). The qualification of the latter remark seems to be justified by the absence of any *ad hoc* authority, unless the direction for

a further inquiry as to negligence in *Foster* v. *Mackinnon* be treated as such.

In *Gillman* v. *Gillman* it was also argued that the separation deed could be ignored because undue influence on the part of the husband could be presumed. This point was disposed of by a citation by Lord Merriman, P. (at p. 273–4) from the judgment of Lord Alverstone, C.J., in *Howes* v. *Bishop*, [1909] 2 K.B. 390 (at p. 395). 'There cannot be a general rule of universal application that the rules of the Court of Equity as to confidential relationships necessarily apply to husband and wife.' In that case, however, which concerned a wife's liability on a promissory note given in respect of a debt of her husband, there had been a finding of the jury that the wife knew what she was signing and that the matter had been fully explained to her. The case of *Chaplin* v. *Bramall*, [1908] 1 K.B. 233, in which a wife was held not liable on a guarantee which had not been sufficiently explained to her was not referred to by the learned President, although, as the separation agreement before him contained an undertaking by the wife not to apply for maintenance, it might be thought to come within the earlier rather than the later decision of the Court of Appeal.

In fact *Gillman* v. *Gillman* is another indication that all is not well with the theory of our matrimonial law. In the first place, there is a conflict between the views that separation agreements are purely personal matters and that the maintenance of wives is a public concern; it was for the latter reason that the *Gillman Case* was referred back to the magistrate on the question of the husband's wilful neglect to maintain his wife. Secondly, as this case shows, it is doubtful whether the distinction between mistake as to the nature and contents of the document signed which is justifiable in commercial transactions is suitable to those between spouses. The results of applying an objective test to the question of desertion which is usually determined by subjective considerations are likely to be somewhat unrealistic.

Green v. *Green*, [1946] P. 112.

However, there are already instances of downright legal fictions in divorce, and the recent decision of Jones, J., in *Green* v. *Green*, [1946] P. 112, is a reminder that they are sanctioned, in at least one case, by statute. A wife petitioned for divorce in February, 1945, on the ground that her husband had deserted her without cause for at least three

years immediately preceding the presentation of the petition. Between 1930 and 1944, the parties had been living apart under a separation order founded on the husband's desertion for a period of two years and two months. In January, 1944, however, the non-cohabitation clause in the magistrate's order which, of course, operated to prevent the husband from being in law a deserter, was struck out on the application of the wife.

Jones, J., acted on section 6 (3) of the Matrimonial Causes Act, 1937, which provides that a period of desertion immediately preceding the institution of proceedings for a separation order shall be deemed immediately to precede the divorce petition, and decided (at p. 114) that the right course was 'to add to that period of one year which occurred immediately before the presentation of this petition, the period of two years and two months which occurred before the application for the order of 1930'. He accordingly pronounced the decree *nisi*. One may be permitted to ask how the husband can, in law, be said to have been in desertion for the year 1942–3. This is what happens when a theory of '*als ob*' is applied in legal practice!

RUPERT CROSS.

BREACH OF STATUTORY DUTY—CAUSAL CONNECTION

A PLAINTIFF who has proved the breach of a duty of care may be faced with very difficult questions of causation if his injury may, but not necessarily must, have resulted from the breach. If the plaintiff cannot prove an unquestionable connection between the breach and the injury, and if the defendant cannot prove that the injury *must* have been due to some other cause, the case resolves itself into one of the burden of proof and the party bearing it must fail. Does the fact that the plaintiff has already proved the breach of a duty of care help him to shift the burden of proof onto the defendant? In *Mist* v. *Toleman & Sons*, [1946] 1 All E.R. 139 (a case under the Factories Act, 1937) the Court of Appeal held by a majority that it might do so where the injury is caused by 'the very class of accident that the regulations are designed to prevent', but not otherwise.

It was proved that the plaintiff must have been infected with tuberculosis at least six months before he entered the defendant's factory. He had at that time an 'inherent tuberculosis' which might become active at any time due

to exertion. After a month in the factory the plaintiff's condition became active. During that month he was employed in making heels for shoes at a spindle machine which gave off dust and which was not fitted with proper exhaust appliances as required by the Act. It was proved, moreover, that the excessive dust caused the plaintiff to cough badly, and that coughing was one possible cause of his complaint becoming active. At the same time he had been leading a normal active life outside working hours, and it could not be proved that the 'flare-up' of the disease was caused by any one particular form of exertion.

The plaintiff's claim looked strong in the light of two recent cases in the Court of Appeal. In *Vyner* v. *Waldenburg Bros., Ltd.*, [1945] 2 All E.R. 547, Scott, L.J., had said (at p. 549):—

> If there is a definite breach of a safety provision imposed on the occupier of a factory, and a workman is injured in a way which could result from the breach, the onus of proof shifts onto the employer to show that the breach was not the cause.

and he quoted the following sentence from the judgment of Goddard, L.J., in *Lee* v. *Nursery Furnishings, Ltd.*, [1945] 1 All E.R. 387 (at p. 390):—

> In the first place I think one may say this, that where you find there has been a breach of one of these safety regulations and where you find that the accident complained of is the very class of accident that the regulations are designed to prevent, a Court should certainly not be astute to find that the breach of the regulation was not connected with the accident. . . .

The first of these quotations seems intended as a deliberate formulation of a wide rule, while the second appears to be a general statement about the application of that rule. But the Court (MacKinnon and Tucker, L.JJ., Bucknill, L.J., dissenting) took for their rule the second formula and then, by turning it round, proceeded to infer that where the regulations are designed to prevent all or any of a number of classes of accidents (*i.e.*, any injurious consequences whatever) rather than one special class (*e.g.*, the cutting of fingers on an unfenced circular saw), the burden of proving the connection between the breach of duty and the injury remains on the plaintiff. It is true that in *Vyner's Case* the injury, which was in fact from a circular saw, was exactly that contemplated by the regulations and that the Court's

judgment, had the Court so chosen, could have been limited to that class of accident. But it was not, and it is not easy to understand either how the distinction now drawn by the Court of Appeal follows from the decisions cited (both of which were in the plaintiff's favour) or, as is more important, how it can work satisfactorily as a general rule. It says, in effect, that plaintiffs like the plaintiff in this case can succeed under a regulation drafted with reference only to the exact class of injury which they have suffered, but that they must fail if it should happen that the same regulation gives a wider protection against other classes of accidents as well. So that the wider the regulation, the less protection will it give in cases like this.

One concludes, with all respect, that a rule of law has been created to deal with what should in every case remain a question of fact to be decided upon the evidence: has the plaintiff proved his injury to be a sufficiently probable result of the defendant's breach of duty as to shift the burden of proof? It may be that in most cases of breach of statutory duty the rule stated in *Vyner's Case* could be applied without injustice. At least it is preferable to a rule which makes the plaintiff's claim depend on the extraneous question whether the statute creating the duty happened also to contemplate other forms of injury. But is there any reason for special rules as to causation and the burden of proof in cases of statutory as distinct from non-statutory duty? The question is equally, has the plaintiff produced enough evidence to make out his case? Helpful as it would be if there were rules of law for reaching this often difficult decision, it is only to be reached upon the facts themselves. There may, as Tucker, L.J., in his judgment appreciated, be a breach of duty followed by an injury so remote in its possible connection that the plaintiff would have to produce further evidence, for otherwise the employer would be made an insurer against all kinds of contingencies. To this extent at any rate the principle stated by Scott, L.J., needs qualification, for the word 'could' is equivocal. The distinction which ought really to be drawn is that between a bare possibility and a sufficient probability, and that cannot be further defined in the abstract. It has a certain affinity with the distinction drawn by the Court as to 'classes of injuries', but the two are by no means the same. In his short dissenting judgment Bucknill, L.J., treated the case upon the more

natural footing, holding that the plaintiff had, upon the evidence, proved a breach of duty 'likely to cause a flare-up' of the disease, and that this made out his case.

H. W. R. WADE.

DIRECTORS—COMPENSATION UPON RETIREMENT

THE Cohen Committee on Company Law Amendment (Cmd. 6659 of 1945) at p. 52 of their Report recommended that: 'It should not be lawful for any payment to be made for compensation to any director of a company by way of compensation for loss of office or as consideration for *or in connection with his retirement from office*, unless particulars with respect to the proposed payment, including the amount thereof, *have been disclosed to members of the company and the proposals have been approved by the company in general meeting*.'

Although the issue in *Associated Cement Manufacturers, Ltd.* v. *Inland Revenue Commissioners*, [1946] 1 All E.R. 68, was a purely tax question, the facts disclosed in that case, as emphasised by the trenchant irony of Lord Greene's masterly judgment, more than point the moral of the Cohen Committee's recommendation.

Two of the directors of the appellant company—S., the managing director aged sixty-nine, and C. another director aged sixty, who had both served their whole working lifetime with the company—were minded to retire in 1939. One would have thought that at their ages they had well earned their leisure but, as Lord Greene observed: 'The seriousness of the threat overhanging the prosperity of the company did not escape the vigilant eyes of the other members of the Board. The fact that these two gentlemen might in the future engage in competitive activities led to the Board . . . to secure from them restrictive covenants which should ensure that they should not enter into competition with the company.' These covenants were world-wide and, in consideration for them, the Board of the company agreed to pay the directors *upon retirement* sums totalling £30,000; if the directors died before they retired, payment was to be made to their executors. Although the ostensible consideration for the payments was the covenant not to compete, there seems but little doubt that the sums paid were clearly 'in connection with the retirement from office' of these gentlemen, to use the words of the Cohen Report.

The following extract from the judgment of Lord Greene shows how the transactions were dealt with in the accounts and thereby concealed from the shareholders, *viz*: 'In the company's accounts a rather remarkable entry appears. The accounts laid before the shareholders consisted of a profit and loss account and a balance sheet. In the profit and loss account there appears this item on the credit side: "By profit on trading after deducting management expenses, bad debts, *sundry reserves* and provision for taxation, £879,282." The words with which we are concerned are "Sundry reserves". . . . When one looks at the trading account, one finds an item entitled "Sundry Special Reserves £30,000". That £30,000 is the sum of the two amounts . . . with which we are concerned . . . . It was Voltaire (who had a certain dislike of shams) who said of the Holy Roman Empire that it was neither Holy nor Roman nor an Empire. He would perhaps have been less severe on this particular description. Although he might have quarrelled, and rightly quarrelled, with the word "sundry" and the word "reserves", he might well have agreed that the expenditure in question was "special". Apart from that possibility I cannot imagine a more inaccurate entry than this.'

Commenting upon the manner in which the accounts were submitted to the shareholders, Lord Greene said: 'It appears that the Board, no doubt from a feeling of modesty, did not expose themselves to the congratulations of the shareholders upon their important achievement.' MacKinnon, L.J., pointedly observed that, if the payment in question had been made to the executors because of the death of the director before his retirement, the Board would have been gratuitously giving away the company's moneys since there would then have been no consideration at all for the payment. It is interesting to speculate what would have been the shareholders' reactions had the recommendations of the Cohen Committee been implemented by legislation and the proposals in this case for 'compensation in connection with loss of office' been adequately put before them in general meeting.

The point at issue in this case was, of course, whether the two sums aggregating £30,000 could be deducted for the purposes of Income Tax and the National Defence Contribution. It was argued for the company that the payments were allowable as being of a 'revenue' nature in that they had mitigated the potential loss of business that might have

ensued upon the cessation of the directors' connection with the company; moreover no 'asset' could have been said to have been acquired by these payments.

The real test for 'capital expenditure' in these tax cases is the oft-approved *dictum* of Lord Cave, L.C., in *Atherton* v. *British Insulated and Helsby Cables, Ltd.*, [1926] A.C. 205, 213 *viz.*: 'But when an expenditure is made, not only once and for all, but also with a view to bringing into existence an asset or *an advantage for the enduring benefit of a trade*, I think there is very good reason . . . for treating such expenditure as properly attributable not to revenue *but to capital.*'

The Court of Appeal unanimously held that the appellants had obtained an 'enduring advantage' by the restrictive covenants into which the directors had entered, although the danger of competition might seem, in view of the ages of the directors, very remote for, as Lord Greene said: 'In effect the company was buying off potential competitors. . . . There was nothing temporary about this advantage. It was to last for the lives of the directors . . . the benefits acquired by the company were permanent and they were world wide.' In the result the deductions claimed were held to be not allowable.

In conclusion it should be observed that the sums in question could not rank as taxable income of the directors since it was held in *Beak* v. *Robson*, [1943] A.C. 352, that a sum payable to a director under a covenant not to compete with his company, *after he had ceased to hold office as director*, is not a 'profit of office' chargeable under Schedule E of the Income Tax Acts.

A. FARNSWORTH.

RECENT PERIODICAL LITERATURE

IT is hoped, in future issues of THE MODERN LAW REVIEW, to print short reviews of articles in periodicals, both British and American. The present note, however, can, for reasons of space, be little more than a list.

We may mention the following, grouped according to subject-matter.

Jurisprudence. DR. F. A. MANN: The Interpretation of Uniform Statutes, 62 L.Q.R. 278; the author suggests that statutes which give effect to international conventions should not be interpreted according to the domestic rules of interpretation of the various States concerned, but uniformly so as not to diminish the value of the conventions. DR. GLANVILLE L. WILLIAMS: A Lawyer's 'Alice', 9 Camb.L.J. 171; this is a delightful transposition of part of *Alice's Adventures in Wonderland* from the mathematical and philosophical into the legal key. SIGMUND TIMBERG: Corporate Fictions, logical, social, and international implications, 46 Col.L.Rev. 533. CLYDE W. SUMMERS: The Sources and Limits of Religious Freedom, 41 Ill.L.Rev. 53. HON. WILLIAM O. DOUGLAS: The Lasting Influence of Mr. Justice Brandeis, 19 Temple L.Q. 361. C. SUMNER LOBINGIER: Common Roots of Law and Religion, 19 Temple L.Q. 390.

Roman Law and Legal History. DR. DAVID DAUBE: Sponsor and the History of Contract, 62 L.Q.R. 266. The question dealt with is this: does the narrow technical meaning of 'sponsor' reflect an early equally narrow meaning of 'spondere' as has been urged in support of the view that stipulation originated as suretyship? KOPEL KAGAN: The Nature of Ususfructus, 9 Camb.L.J. 159; the author suggests that it is not merum ius and proposes to develop the theme in a further article. S. J. BAILEY: Warranties of Land in the Reign of Richard I, 9 Camb.L.J. 192. K. KAGAN: The Nature of Dowry in Roman Law—Rights of Husband and Wife, 20 Tulane L.R. 557.

Constitutional Law. WATSON SELLAR: Government Corporations, 24 Can.B.Rev. 393, 489.

Law of Property and Revenue Law. S. J. BAILEY: 'To A and His Issue'; the Law of Property Act, 1925, s. 130 (2), with a note by J. H. C. Morris, 9 Camb.L.J. 185. F. H. NEWARK: Public Benefit and Religious Trusts, 62 L.Q.R.

234; is it necessary to prove that a trust for the advancement of religion is, in addition, directed to the public benefit or will it be considered as a charitable trust *ipso facto*? Dr. A. Farnsworth: 'Fact' or 'Law' in Cases Stated Under the Income Tax Acts, 62 L.Q.R. 248; the author analyses the distinction between facts and law. E. H. Bodkin: Bequests to Servants, 10 Conveyancer 189; who is a servant and at what dates must he have been in service? B. J. Sims: Death Duties and Powers of Appointment, 10 Conveyancer 197. D. Heap: Planning: Three Matters Concerning Interim Development, 10 Conveyancer 202; the matters are (1) temporary consents, (2) resumption of former use of property after temporary discontinuance owing to war-time circumstances, (3) control over advertisements. L. A. Blundell: Furnished Houses (Rent Control) Act, 1946. Ruford G. Patton: Future of Trust Legislation in Latin America, 20 Tulane L.R. 542.

Family Law. Judge Harry M. Fisher: Pater Familias—a Co-operative Enterprise, 41 Ill.L.R. 27; the article contains an historical survey of the rights and duties of parents as well as a discussion of the State's activities concerning children and young people, both present and future. See also the next-mentioned article.

Law of Contract. Prof. W. J. Brockelbank: The Nature of the Promise to Marry—a Study of Comparative Law, 41 Ill.L.R. 1.

Law of Tort. Harry Nims: Damages and Accounting Procedure in Unfair Competition Cases, 31 Cornell L.Q. 431.

Mercantile Law. Dr. E. Wolff: Legality of a Provision in a Power of Attorney that it shall not be revoked by the donor's death, 62 L.Q.R. 273.

Criminal Law and Procedure and Criminology. R. M. Jackson: Moot Case on Murder and Arson, 9 Camb.L.J. 154; the report of a moot case tried at the Cambridge University Law Society. The prisoner had set fire to a building in order to claim the insurance money and a person employed on the premises was burnt to death in consequence. Is the prisoner guilty of murder? Henry Barnes: Liability for Crime, 9 Camb.L.J. 210; an analysis of the conditions of liability. Frederick J. Gaudet: The Differences Between Judges in the Granting of Sentences of Probation, 19 Temple L.Q. 471. Dr. G. P. Coon: Psychiatry for the Lawyer—Common

Psychiatric States Not Due to Psychosis, 31 Cornell L.Q. 466. G. R. Forneret: Prisons Are Outmoded, 24 Can.B.Rev. 471.

International Law. Hon. Robert O. Jackson: The Law under which Nazi Organisations are Accused of being Criminal, 19 Temple L.Q. 371. M. Vashti Burr: The New Trend in International Law, 19 Temple L.Q. 449. Charles Cheney Hyde: Protection by the United States of American-Owned Property in War-stricken Areas, 46 Col.L.R. 519.

W. A. Steiner.

REVIEWS

INTEREST AND USURY IN CATHOLIC THEOLOGY. By the Rev. LEWIS WATT, S. J. (Oxford: Catholic Social Guild. 2s. 6d.)

THE author of this little book is an admitted solicitor who, many years ago, left the practice of the law, and all things else, for the more fruitful science of theology. In this essay he sets out in plain and popular language the essential elements of Catholic theology in relation to Usury. Apart from the circumstance that (as we shall see) the teaching of the theologians is, after a long interval, again being accepted by leading economists, the essay is of interest to lawyers, since these elements of Christian theology furnish the key to an understanding of the attitude of the English law in relation to Usury over a period of centuries. For, in its attitude to Usury as in other matters, the common law of England was framed and directed over a long stretch of time by men who were 'formed' in the schools of Christian philosophy and theology.[1]

For the Christian theologians, Usury is wrong in itself (*malum in se*) since it is unjust to attach to the sale of a 'fungible' thing a charge (by way of 'interest') for the *right to use* that thing, over and above the just price of the thing itself.[2]

Now money *as such* (*i.e.*, in so far as it is a means of exchange) is a fungible thing. If A lends B ten units of current coin, B pays his debt by handing back to A ten units of current coin. The right of user passes to B with the coin. It is, therefore, unjust for A to seek to charge B interest for the *right to use* a 'fungible' thing like coin.[3]

[1] Thus, Stephen Langton was for a period of some twenty years a professor of theology at the University of Paris. Patteshull and Raleigh and Bracton, who are named on the final page of Pollock and Maitland's History were in their true profession canonists and prelates of the Christian Church. Sir John Fortescue, as he who runs may read in the *De Natura Legis Naturae* and elsewhere, was not only a constitutional lawyer but an accomplished theologian. Sir Thomas More was not only the greatest advocate of his time but one who was 'thoroughly familiar with the theology of the Schoolmen'. And Christopher St. German was, on his own showing and on the testimony of Professor Vinogradoff, deeply indebted to John Gerson, Chancellor of Paris, and through Gerson to St. Thomas Aquinas.

[2] A 'fungible' thing, it is scarcely necessary to add, is a thing which is consumed in the use and therefore unproductive.

[3] In 1821 an official instruction of the Roman Church declared that Usury is against natural law and justice.

The technical arguments which underlie and explain the prohibition of Usury are set out by Aquinas in the Treatise *De Justitia*, Q. 78, Aa. 1—4.[4] Though the medieval condemnation of Usury was rejected by Calvin,[5] the traditional teaching was re-affirmed by Pope Benedict XIV in the Encyclical *Vix Pervenit* in 1745: 'The species of sin which is called Usury, and which has its roots in the contract of *mutuum*, consists in this: *solely on the ground of the mutuum*, the nature of which is to require that only so much be returned as was received, a person demands that more be returned to him than was received; and so maintains that, *solely on the ground of the mutuum*, some profit is owed to him over and above the principal.'

And in the Code of Canon Law in 1917 it is decreed: 'If a fungible thing be given to someone in such a way that it becomes his, and that later he is to return its equivalent in quantity and kind, no profit can be taken *merely by reason of this contract.*'

Merely by reason of the contract: A stipulation for legal interest is not in itself wrong if there is a just title to it extrinsic to the contract of *mutuum*. In other words, the lender may lawfully ask to be protected against the risk of the debtor not repaying his debt; or, for any damage accruing to him through parting with his money; or, for any loss of opportunity of making a justifiable profit with the money in trade.

This loss or damage accruing to the lender (technically called *lucrum cessans* or *damnum emergens*) was known as an *extrinsic* title since it arose from circumstances extrinsic to the loan which might or might not be present, and not from the bare fact of the transfer of the money. The interest allowed was thus in the words of Professor Ashley[6] 'compensation not for the loan of money but for the loss suffered by the lender in consequence of the loan'. Like Professor Ashley who, if one may judge from the preface to the second edition of his work, appears to have been converted to the medieval view of Usury, the late Lord Keynes stated in his

[4] See the admirable pocket edition of the Latin text and French translation, with notes and *renseignements techniques*, by Père Spicq, O.P. (Desclée et Cie., Paris) where the history of Usury is traced from its sources in Aristotle and in the Old and the New Testament, through the Christian Fathers, to Aquinas and the Canonists.

[5] See Tawney: *Religion and the Rise of Capitalism*, 1937, Pelican edition; Wilson, *A Discourse on Usury*, with introduction by Dr. Tawney.

[6] *English Economic History*, Vol. I, p. 398. See also, Holdsworth, *History of English Law*, vol. viii, 100-1, 112; vol. xii, 397, note (9).

General Theory of Employment (1936): 'I was brought up to believe that the attitude of the medieval church to the rate of interest was inherently absurd and that the subtle discussions aimed at distinguishing the return on money loans from the return to active investment were merely jesuitical attempts to find a practical escape from a foolish theory'; but he went on to say that he had revised his opinion and looked upon the disquisitions of the Schoolmen as aimed at a formula which would lead to keeping down the rate of interest to the advantage of 'the marginal efficiency of capital'. And Lord Keynes (according to Fr. Watt at p. 51 of his essay) urged the rehabilitation of the doctrine that the rate of interest constantly tends to rise too high 'so that a wise government is concerned to curb it by statute and custom, and even by invoking the sanctions of the moral law'.

Of the worth of this little essay by Fr. Watt, Lord Keynes has left, in a letter to a friend dated April 9, 1946, less than a fortnight before he died, this opinion: 'The little volume by Fr. Watt is in my judgment extremely well done, clear, comprehensive and short. Much the best account of a very interesting subject from the Catholic point of view that I have ever read. What quite clearly emerges from his argument and is indeed the essence of it [is] that the correct measure of interest is the loss actual or potential to the lender, and not the gain to the borrower. In other words, it is usury to extract from the borrower some amount additional to the true sacrifice of the lender which the weakness of the borrower's bargaining position or his extremity of need happens to make a feasible proposition.

'I find it interesting to put it this way because it really amounts to exactly the same thing as my theory of liquidity preference. My point there is that interest proper measures the sacrifice to the lender in giving up liquidity and duly varies according to the degree in which liquidity is surrendered. I deny accordingly what has been the orthodox economic view in recent times, namely, that it is the productivity in the hands of the borrower which is the right measure. In conditions of equilibrium, of course, the two have come into a proper relation. But that does not affect the question of what interest really is.'

RICHARD O'SULLIVAN.

INTERNATIONAL LAW: VOL. I, INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS. By GEORG SCHWARZENBERGER, PH.D., DR.JUR. (London: Stevens. xliv, 645 pp. £3 net.)

'The writing of history', avers Maitland, 'is in some sort an act of religion.' The writing of international law is certainly not less so, and upon the teacher of that subject there lies a duty infinitely more compelling than the force which urges all academics into print. For him the consideration that 'that book, these articles' are the key to promotion is wholly secondary. His is the prophet's duty of bearing witness. It may indeed carry with it the traditional meed of honour (and that not always merely extra-territorial!). That his name should stand with those of Wheaton and of Westlake is fame enough for most men. To assist to 'lay down such rules and suggest such measures as may tend to diminish the evils of war and finally to extinguish war between nations', to use the words of Whewell's charge to the professors of his foundation, is golden opportunity as well as solemn duty. To become the least of the publicists is to join the ranks of the makers of law even as it is for the newest of judges to take his seat in the Court where once Mansfield sat. Yet example can be as oppressive as it is inspiring. It is comforting to say: 'I, too, could have been a Mansfield or a Bentham in those times'. It is, indeed, fatally easy to argue thus. And perhaps this fatal ease is in part responsible for the notable fact that whole decades have now passed since the appearance in the English-speaking world of a new general treatise on international law. But repetition is not necessarily genius and new ages may need new forms. Granted that a similar though less great duty and opportunity to become authority personified exists for the teacher of municipal law—and who, remembering Blackstone, shall deny it?—comparison with the common law scene is permissible. Perhaps our age calls for specialisation rather than the general view, and to complain that there are no more general treatises is as absurd as to lament the passing of the abridgments. The parallel, however, is inexact: the *Commentaries* arose, in a subtle sense, from the ashes of Viner's *Abridgment*. Specialisation among writers on municipal law, moreover, led to no evasion of the fundamental problem—of the justification, of the *justice* as it were, of the law minutely expounded. Beside Blackstone stood Bentham to point the shortcomings of that which was commented upon. Beside the private lawyer who was all lawyer, Pollock, stood the public lawyer Dicey, and as we now know, the judge who was much more than lawyer, Holmes. But specialisation within international law has always been an evasion. Minute examination

of the rules relating to blockade or ratification, concentration upon ships or sealing wax, neither discharges the duty nor exploits the opportunity of the publicist. Yet the temptation to devote 'that book, those articles' to the particular is enormous. For the general is so very dangerous. Its exposition—that necessary act of religion—where it is not the mere ancestor-worship or supererogation of an editor or revivalism of a populariser—is so apt to be either Satanism or exhibitionist heresy. If the cry: 'Evil be thou my good', so natural in time of trouble, can be resisted, it is still difficult to avoid becoming a Father Divine. At the most no more than an act of faith seems possible. The courage of an author offering now a general treatise is to be saluted. The appearance of such a book is a notable event and the work itself may not be lightly dismissed.

Dr. Schwarzenberger, the learned author of the treatise the first volume of which is now before us, is already well known; the pious urge has always been evident in him. Never evading the fundamental problem by taking refuge in specialisation, he has at one time inclined towards revivalism (in *William Ladd*, and in *Making International Law Work*) and if he has never joined the Satanists (the capital S is as natural and as reprehensible as in the word State!), he has at least written a book (*Power Politics*) about Satanism. And now he appears as a methodist. For this latest product of his pen is declared to be no ordinary textbook of the law of nations. Its method of treatment is to construct the system from international (Vol. I) and British decisions (Vol. III), and from British state practice (Vol. II) without reliance on the books of authority.

It may be said at the outset that it is a misfortune that Volume I shall have appeared alone. This circumstance makes it peculiarly difficult to be fair to Dr. Schwarzenberger or to be helpfully critical. Assessment of the work is impossible before its completion, and its present incompleteness inevitably focusses attention upon its defects rather than its merits. A time may possibly come when international law can be written from the cases in works similar to *Williston on Contracts* or *Pollock on Torts*. But that time is clearly not yet, and a system constructed exclusively from the (international) cases, as the learned author's so far appears to be, is bound to be incomplete and lop-sided. No judgment can yet be passed as to whether the volumes still to appear will complete the picture and redress the balance. The restriction of the sources yet to be drawn upon to British practice and British decision provokes the *a priori* opinion that they will not because they cannot. This restriction, incidentally, might give ground for the unworthy suspicion that Dr. Schwarzenberger adheres to that

common heresy which sees international law as no single system but as consisting in at least two sorts: one having something to do with foreign states and one a kind of English law—the rules applied by English Courts in cases with a public foreign element. A reviewer entertaining that suspicion and considering the present volume alone might dismiss it by saying that it is a mere international case book (nothing new), that it is nicely printed (rare in these days), presumably accurate (anyone can reprint), rather expensive (not the author's fault), and to conclude his remarks by expressing or not expressing, according to taste, a doubt as to whether it was worth publishing if it could only be published at a library price, since libraries contain the original decisions, not to mention earlier collections such as that in the *Fontes Juris Gentium* series.

But to treat the courageous venture of the learned author in this cavalier fashion would be both unhelpful and unfair. Dr. Schwarzenberger means it to be more than a mere case book or reprint. It is not so much that he fails to deal with the writers, but that he deliberately does not do so. In his introduction he attacks ' positivist international lawyers ' and the ' leading positivist text-books ' for claiming to provide an alternative to natural law, and for failing to do so by not finding accepted rules in the practice of states, and by not in general achieving a comprehensive analysis of the attitudes even of their own nations; for falling into the sin of voluntarism—of selecting from state practice instances fitting into their own schemes of international law or coinciding with the presumed interests of their own countries; and for exposing the law to the attacks of the Satanists—its deniers—by turning it into a new natural law in positivist disguise, into a system without scientific basis. This is indeed a bitter attack. It would be more understandable if the Jeroboams arraigned were identified and identifiable. No matter. A man is entitled to dislike text-book writers if he will, and to reject them in favour of judgments as the sources of his system, as the learned author does. Curiously, he goes no farther than to found the intrinsic authority of judgments, even of the Permanent Court, upon ' the standing of the international lawyers of whom the Court is composed, and the lucidity and persuasiveness of their exposition ' (p. 3). It is pertinent to inquire in what connection Messrs. Hurst, Hudson, Schücking, Huber and Anzilotti, to name five judges at random, have standing save as writers? Surely a judge, unless his decisions are invested with authority, is just another individual with an opinion, just another writer.

International decisions not being as yet too numerous, the construction upon the basis of them alone of a system of international law naturally produces an unfamiliar arrangement. One may go further and say that it produces a fundamentally

unscientific arrangement and a wholly ill-balanced system. Chance alone dictates the variety of topics upon which a Court pronounces. Over an infinite period of time it will, of course, pass upon everything. Yet it is surprising how often new situations will present themselves for the Courts of this country even after some seven hundred years. But it must be freely admitted that Dr. Schwarzenberger's book is not as ill-balanced as one would have expected. This is in some measure due to his having relied also upon the decisions of the Permanent Court of Arbitration, of the Mixed Arbitral Tribunals, and even of bi-lateral arbitral tribunals. There is no reason why he should not have called in this lesser world to redress the balance of the greater. But the relative authority of these secondary decisions, not noted for 'lucidity and persuasiveness', and of opinions of great jurists or practice of foreign ministries is eminently debateable. It would be invidious to select indifferent arbitral awards for comparison with good writers. But it would be easy. And any differentiation amongst awards would lay the selector open to the charge of voluntarism—a charge which Dr. Schwarzenberger cannot in any event escape, since he has clearly not dealt with all international decisions extant.

Since he confesses to a suspicion of foreign ministries almost as deep as that which he nourishes in regard to writers, it is surprising to find that Dr. Schwarzenberger proposes to go further in the next volume and rely for the completion of his system upon the views of one of them. But he admits that international law is more than a system of (*semble*—international) case law, and that legal opinions expressed in state practice, the views held by municipal Courts, and the treaties concluded by individual states, are 'sources which prominently represent international law in the making'. He proposes, apparently, to treat each of these sources in the same manner in which international decisions are treated in this first volume. The ultimate result would thus appear likely to be not one treatise but three, each setting forth a separate system as it appears by reference to a single source. This odd-sounding arrangement, it should be explained, is adopted in order to introduce students to the method of using each of the sources treated. It is not quite clear to this reviewer why the introductions could not have been effected simultaneously: students of English law appear to have no difficulty in grasping all the sources of that law together. Nor does this reviewer think that Dr. Schwarzenberger has sufficiently justified his reliance upon municipal decisions. And his initial rejection of writers in favour of international cases is, of course, enormously compromised by his ultimate acceptance of all other lesser sources.

It seems, however, trivial to labour objections to Dr. Schwarzenberger's method of which he must be well aware. The fact

is that he has adopted a certain manner of teaching which he has found, he tells us, 'an exciting experiment', and he has now embarked on the experiment of writing the book—we dare not say the text-book—of the course. He calls this method the inductive method, and the advertisement to his book proclaims it to be the method familiar to Anglo-Saxon lawyers. Induction is indeed a process resorted to by the common lawyer: general rules are indeed induced from a line of particular cases. But it would be a mistake to imagine that a particular case is decided in accordance with a *particular rule*. Law is necessarily general, and that the technique of the English or American judge is both deductive and inductive is too often forgotten. Dr. Schwarzenberger naturally knows this, and it would be improper to imagine that he urges the abandonment of all deduction. But it is fair and proper to offer as criticism of him—and other writers on international law—some comments upon the use of the case-law method in their sphere. The work of the more considerable English and American specialists in recent years has made this method justly popular. But is the over-emphasis of 'private law analogies' or the universal use of private (common) law methods wholly desirable? Does it not, in the first place, tend to obscure that the contemporary movement of law is not 'from status to contract' but in the reverse direction? That the contrary should be the uninformed or unreflecting conclusion is natural in view of the conservatism of law schools. 'Taught law is tough law', Dicey well knew, and the curious result is that there are still men alive who believe the constitution to be as he described it. That he qualified his original opinions in exhaustive prefaces, that Maitland pointed out the error, and that others such as Dr. Jennings have since devoted much energy to refuting him does not matter. The classical text still remains and that is often all that is remembered. The classical view of the constitution, however, is now not merely imperfect but positively misleading, and the classical view of the balance of the legal system—particularly in regard to such matters as the relative prominence of public and private law, of statute and common law, and as to the general attitude of the Courts towards statutes—is no less so. There is much to be said in favour of re-writing the whole of English law now with much greater emphasis upon public law—upon the inequality rather than the equality of men before it, and upon the restrictions it imposes rather than the liberties it confers. One example of the inadequacy of the classical view, one, incidentally, touching international law, may be given. The traditional statement of the relation between treaties and legislation is this: the Crown alone possesses the treaty-making power and Parliament alone the power to change the law. Therefore, a treaty which contem-

plates a change in the law needs legislation. But, as the Crown means the Crown as advised by the Ministry, and as the Ministry in practice commands majorities in Parliament, does it not appear from the point of view of the individual that the Ministry for the time being possesses power both to conclude treaties and to implement them by legislation? And would it not be more realistic to formulate the general rule thus, subject to the inevitable exceptions, rather than to go on treating the exception as the rule?

The case for restating the law of nations from a public law as opposed to a private law point of view seems even stronger. For the atomistic character of international society is its greatest ill. And the influence of writers being—*pace* Dr. Schwarzenberger—what it is, would not a tradition of exposition of international law as a system of a public law rather than a private law type conduce to a desirable solidarity in no small measure? Such an exposition would, it may be objected, be impossible because untenable in theory. This may well be. Yet it is not to be denied that the attribution of some situations to international rather than to municipal law has had some influence in strengthening the former system. For instance, it is a common-place of the text-books on international law that the jurisdiction of States is, in general, limited to their territory, and it is a fact that, in general, municipal Courts will not entertain actions arising out of occurrences in foreign places. But if the rules limiting the competence of Courts in this respect are examined they will be found to be municipal rather than international in origin in more than a formal sense. They will be found to depend on the principle of effectiveness rather than on that of the immunity of states. Further, even if international law is still in theory a law of co-ordinates rather than of superior and inferiors—as the principles laid down to guide the United Nations Organisation do not fail to proclaim—that is a situation which is not necessarily immutable, nor is it one which it is desirable to stress too much. Even if we may not yet write that law as public law we may at least refrain from underlining its atomistic tendencies by calling it private law, and demonstrating that characteristic of a law of co-ordinates which it enjoys in common with private law. A treaty may well look more like a contract than a statute, but there is implicit in the private law concept of a contract the existence of overriding rules regarding reality of consent, legality of object, and enforceability, unknown to international law. Further, the contractor of private law is subject to a public law system which will, by such instruments as the tax collector, the Bankruptcy Court and the Public Assistance Committee, do distributive justice between him and his fellows.

Such overriding rules and distributive institutions are as yet rudimentary in international law. That law, moreover, has developed institutions having the same end but in different forms—for the *clausula rebus sic stantibus* is of much wider scope than the doctrine of frustration. Is it, therefore, wise or expedient to call a treaty a contract? It may not be very much more apt to call it a statute. But surely the exploration of 'public law analogies' and of the beginnings of a system of distributive justice in the international sphere is the solemn duty and peculiar opportunity of the teacher of our time.

Relevant though we conceive this disquisition upon the general tendency of the case method to be, Dr. Schwarzenberger may complain that it has little to do with the contents of his book. Turning, therefore, to his text, we must say that it is 'excellently done'. That is, of course, within the comparatively narrow limits he has set himself. No real criticism can be made of his arrangement of his material. For that is classical and his Table of Contents might be that of any text-book. This is possibly surprising. Might he not have found further interest by arranging his matter under some such headings as Sources, Law of Actions, Law of Persons, Law of Things, and Obligations (with Agency as sub-heading)? That might have produced a shift of emphasis more provocative of thought than that which the arbitrary selection of sources alone does. Volume II, incidentally, may produce more surprises in the matter of emphasis than does Volume I, but its capacity so to do will be much restricted as a result of its exclusive concern with the practice of one state. Volume III, again, may do the same, though the consequences for the business of the Courts of what Lord Stowell called 'the insular situation of this country' are perhaps better known than the effects of geography upon the legal experience of the Foreign Office.

If Dr. Schwarzenberger could find it in his heart to cultivate a simpler style the general reader would, we venture to think, be assisted. Such expressions as 'the pivotal position of the right of independence in the system of international law' (p. 47), 'international protection . . . takes place' (p. 64), and 'situations obtaining between . . . parties' (p. 72), in which the books abounds, approach the obscure. But such blemishes do not altogether detract from what is at least an interesting and certainly a courageous work.

CLIVE PARRY.

STUDIES IN POLISH AND COMPARATIVE LAW. A Symposium of Twelve Articles. With a foreword by PROFESSOR H. C. GUTTERIDGE, K.C., LL.D. (London: Stevens. 1945. viii and 274 pp. 25s. net.)

DURING the present war many distinguished lawyers from continental European countries have lived in exile in our midst. It will always be a matter for regret that conditions of life in war time made it impossible to utilise the enforced stay of so many of the leading men among contemporary civilians for an organised effort to advance the sake of comparative law in this country. All the more reason is there to welcome a stately volume, presented by the Polish Lawyers' Association in the United Kingdom and containing contributions to nearly every field of legal science.

It would be unfair to greet the appearance of so precious a gift, prepared and presented at times which made neither the research nor the publication an easy matter, by a few polite words on the valuable addition to the English literature on comparative law which this volume constitutes. It is often said that it is an odious job for a reviewer to compare the individual contributions in a volume of essays like the present. Yet such comparison is necessary and its result is, I think, in this case not without significance. In the present reviewer's opinion there is little doubt that any reader of this work must be struck by the fact that by far the most interesting, and probably also the most helpful, contributions are those which are devoted to subjects of private law. Dr. Nagorsky's article on the codification of the Polish civil law describes the work on the latest European codification, interrupted unfortunately by the outbreak of the war. One wonders when and in what conditions it will ever be resumed. The Polish Code of Obligations, the only part that was completed, shows sound workmanship and the influence of that type of continental legal technique which was inaugurated by the Swiss Civil Code of 1910—very brief sentences, an attempt at combining popularity with precision, a strong tendency to sacrifice the latter rather than the former, and the continued adoption of the traditional system of civil law inherited from the nineteenth-century German pandectist writers. German influence on the Code of Obligations appears to be stronger than Professor Capitant, whom Dr. Nagorsky quotes with approval, seems to be willing to permit. Thus, the three most important articles of the German Civil Code, *i.e.*, sections 133, 157 and 242 are repeated in articles 107, 108 and 189 of the Polish Code of Obligations, practically without alterations. Perhaps the most important innovation is the introduction of a *clausula rebus sic stantibus* into the law of contracts (article 269). Dr. Nagorsky rightly points out that

the vicissitudes of the post-war period rendered such a clause indispensable in Poland. Those countries which needed it, but did not possess it, soon procured it by a more or less tortuous interpretation of existing provisions. One wonders to which extent the present post-war period will revive the old problem again.

Any lawyer who desires to read something really startling is advised to turn to Dr. Alexandrowicz' article on ' Marriage Law in Poland '. The author had to describe a part of Polish law that has not yet been unified. A veritable jumble of different legal ideas and systems, incorporating the most divers legal ideologies, had therefore to be summarised here. The Roman Catholic and the Greek Orthodox Church, the French revolution, the Habsburg monarchy in its dual form as lord over two such different States as Austria and Hungary, and finally Imperial Germany—each of these has left its traces on one of the six different systems of law that until recently prevailed in Poland. The author has summarised all this mass of facts and conceptions with consummate skill. He has added to the interest of his unusually attractive contribution by comparative sidelights thrown upon the laws of other Eastern European countries. It is little to be wondered at that, the substantive law in Poland being as diverse as Dr. Alexandrowicz describes it, questions of the conflict of laws, did soon play a very prominent part.

Dr. Kuratowski in his admirably clear article on ' Some Principles of 'Conflict of Laws in Poland ' has given a reliable guide through the Polish law on this topic. Its publication in this country will be welcomed by many a sorely tried practitioner faced with problems in this field. The sharp distinction between the rules of inter-provincial and the rules of international private law adopted in Poland is of great interest. English courts make no distinction between a rule of Scottish or a rule of, say, Swedish law: both are treated as ' foreign law '. Similarly, in the U.S.A., no distinction is made between inter-State and international conflicts. In Poland, on the other hand, no court can ever consider a rule of Polish law as a rule of foreign law, even though the court itself is established in a territory where the law in question does not apply. An intenser nationalism may partly explain this difference between English and Polish law. But one may well doubt whether there is not some better justification for the distinction. The problem might be worth a study in comparative jurisprudence from a deontological point of view.

Dr. Fryde's article on ' Certain Aspects of Modern Corporations ' stands on that border-line of law and economics which lawyers in this country are often disinclined to enter. An

admirable amount of reading combined with a thorough knowledge not only of the law, but also of the facts and tendencies underlying it have produced a presentation of the problems that cannot fail to interest any lawyer who has learned that in this field much more is required of him than a knowledge of legislative rules and judicial precedents. Dr. Fryde makes lengthy reference to the excellent American literature on corporation problems, produced under the influence of the sociological school. One wonders how long our own text-book writers will be able to ignore the achievements of this school and feed the student on little, but an abbreviation of the Company Act, slightly embellished by abridgments of a few cases, selected with little regard to their importance for either the practice or the reform of the law. The Cohen Committee had nearly completed its task when Dr. Fryde's article was published. It is to be regretted that the distinguished author had no opportunity of giving evidence before the Committee. Though his article is devoted to stating problems rather than to solving them, one suspects that he might have had to say something on some of those aspects which in the view of a number of critics the Report of the Cohen Committee has somewhat neglected.

The present reviewer possesses no qualification for appreciating work in the field of criminal law, but Professor Glaser's short remarks on the Polish Criminal Code seem to him to be a very excellent introduction to a codification of which little has yet become known in this country. Dr. Szurlej's article on '*Nullum crimen sine lege*' deals, not with the much debated rule of *nullum crimen sine lege* which the totalitarian regimes have tried to put into the dustbin of history, but with the problem of the prosecution of war crimes. Unfortunately, political passion has more than once carried the author outside the sphere of cool and scholarly reasoning. No doubt such passion is fully excusable and perhaps even justified, but it does not increase the persuasive effect of legal arguments.

Two other contributions are not wholly free from the taint of political bias. Professor Komarnicki's concise article on the 'Spirit of Polish Constitutional Law and its Recent Development' glosses over some of the difficulties of the subject. That the Polish Government in exile worked on the basis of the Pilsudski constitution of 1935 was surely not 'necessary in order to ensure a strict legal continuity of the State'. This constitution, as Professor Komarnicki rightly states, had itself been introduced by a *coup d'état*. Legal continuity in such circumstances can hardly count for very much. The 1935 constitution proved a great obstacle in the Polish fight for liberty. Those who did most to uphold it, made strange bedfellows with many of the fighters for democracy. To-day there can be little

doubt that in the interests of Polish freedom and independence it would have been much better to scrap the 1935 constitution immediately on the collapse of the Colonels' régime, whose requirements it had been made to serve. One wonders, too, at the peculiar way in which Professor Komarnicki uses the term 'liberalism'; he considers as a 'liberal' State the Poland of the time previous to her first partition, when all citizens were equal, but when only the nobles were citizens. Dr. Moderow writing on the 'Revision of Treaties and the Interests of Peace' thinks that the German campaign for the revisibility of treaties constituted an unsettling and even a menacing factor in the development leading to the second world war. While one will readily agree with him so far, it seems less certain whether his own attitude, which rejects any revision of territorial decisions, has any chance of prevailing under present conditions. Dr. Moderow's article was probably written before the Potsdam resolution on the boundaries of Poland had been published, and certainly before criticism of that fateful decision has been able to make itself heard. To-day many Poles would welcome a peaceful revision of Poland's Eastern frontiers, while many other Europeans feel a great deal of uneasiness at the chance that no peaceful revision of her Western frontier should be possible.

Professor Grodynski's article on Polish Budget Law is, of course, of a more technical character, but illustrates happily enough the truth of Professor Komarnicki's statement that with all its many bad features Pilsudski's dictatorship was yet not on the same level with the dictatorship in Germany and Italy; the Polish Diet at least had a budget on which to vote. Dr. Poznanski has contributed a short but thoughtful study on the status of consuls in international law. He reviews the various attempts at codifying this important part of international law, and expresses the hope that the work which had been begun before the war may soon be continued. Yet, as he rightly says, it is difficult to forecast what part the consular service will play in the new world. Prophecies have too often been proved to be wrong. The much repeated desire to do away with honorary consuls, to mention one topic only, seems destined to remain unfulfilled. The smaller States have not enough man-power available to staff a large number of consulates with full-time consuls. On the other hand, the general impoverishment of Europe renders it necessary to provide at least the same number of consulates as before the war, to save those resorting to them lengthy and expensive journeys.

Dr. Bloch's essay on labour legislation and social insurance in Poland contains an appreciation of the achievements of the pre-war Polish Republic in these vital fields. The introduction gives an impressive statement of the background against which

these reforms were introduced in a country that had for so long been under the sway of the worst which the world's worst administration, that of the Czars, could do. Throughout, the author shows how pre-war Poland realised the standards laid down in international conventions on the law of labour years before the international conventions were signed. The fact is certainly correct. But it is, of course, also correct that some of the conventions were concluded a little *post festum*.

It remains to speak of Professor Jarra's study on Andrew Wolan, a Polish Calvinist writer, pamphleteer and *homme de lettres*, of the sixteenth century. Professor Jarra calls him a philosopher of law. After having read Professor Jarra's statement of Wolan's views, I feel some doubt whether Wolan really deserves this epithet. He had his views on people, State and law, but they are scattered over many works and pamphlets devoted to quite different topics, and there is a great deal that was taken over second-hand from others, especially from the great classical writers. But with this proviso one cannot help feeling that Professor Jarra has opened the door for readers of English legal literature to a field of intellectual activity of which very little had been known to them so far. In Wolan a character has been portrayed who, though interesting in himself by the combination in one person of the vocations of judge, statesman and religious leader, gains in importance and significance in consequence of the times in which he lived. Combining the humanistic learning of the Western European scholars with the intensity and devotion so characteristic of his people, Woland was able to think and write on many topics in the course of a long and full life, and to make his views fit squarely into his own passionately defended ideology.

Those who have collaborated in producing this volume must be congratulated on having been able to offer their readers so much and so diverse a fare. This diversity is not the least attractive feature of this book. It is a book which is capable not only of being looked up when necessity makes it imperative to search for information, but of being read by those who feel that there is no harm in widening one's outlook on 'law and life'. It is hoped that in at least some of their readers the authors will have stimulated interest in the science of comparative law and in Polish law, for whose future such magnificent and tragic sacrifices have had to be brought in the course of this war.

E. J. COHN.

STUDYING LAW. Selections from the writings of Albert J. Beveridge, John Maxcy Zane, Munroe Smith, Roscoe Pound, Arthur L. Goodhart, Eugene Wambaugh, John H. Wigmore, Charles B. Stephens. Edited by ARTHUR T. VANDERBILT. (New York: Washington Square Publishing Corporation. 1945. viii and 753 pp. $4.75.)

ACCORDING to the publisher this handsome volume is designed for 'returning veterans interested in the law, college students who are contemplating the study of law, first-year law students who wish to gain a general view of the field of law . . . and the general reader'. As its title-page indicates, it is not an original work but a selection of writings which may be inspiring, informative or otherwise helpful to the young student of the common law. It opens with twenty pages of inspiration, of the highest moral tone ('The Young Lawyer' by Albert J. Beveridge), from which we cull a few maxims: 'Your greatest reward is not your fee but the doing of a perfect piece of work', 'Think daily of the nobility and dignity of your profession', 'Never be ponderous, never be florid; at the same time never be dry. Be clear, be pointed, be luminous', 'Do not use intoxicants; even beware of coffee'. Rigorous precepts, but perhaps worth enunciating if by zealous adherence to them the student may attain the enviable condition of the practitioner described on pp. 31–2 as being 'as lithe as a panther, sharp as a serpent's tooth, as lucid as the atmosphere on a cloudless day and yet as suggestive as a hickory wood fire in the old home fireplace on a wintry night'. But the cynic may be reminded of the Forensic Fable of 'The Great Lawyer who told his Audience How to Do It'. The volume ends with two extracts from reports prepared for the American Bar Association. One, by the editor, on 'Prelegal Education', may be useful to the teacher for the views it quotes from various distinguished men, but it seems too wide in scope for the average student; indeed, the writer has to admit, after discussing the respective merits of a training in English, social sciences, history ancient and modern, mathematics, Latin, accounting, logic, scientific method, psychology, philosophy, physics, chemistry, biology, that the future lawyer will doubtless find that 'he cannot master every study recommended'. And the cynic may recall the Fable of 'The Proud Parent Who Did His Best for Alfred'. The other, by Charles B. Stephens on 'Finding Your Place in the Legal Profession', discusses briefly and helpfully, in the light of American conditions, the advantages and disadvantages of general and specialised practice, of individual practice and partnership work, of large and small town practice, of private practice as against Government

employment or work in the legal department of a business firm, and so on.

In between comes more solid fare. It is unnecessary and would be presumptuous to attempt here any fresh criticism of such familiar and authoritative writings as Zane on 'Five Ages of the Bench and Bar of England' (reprinted from *Select Essays in Anglo-American Legal History*) or Goodhart on 'Ratio Decidendi' (from *Essays in Jurisprudence*). And it is sufficient merely to mention Pound on 'An Introduction to American Law' (an outline course of lectures prepared for the Trade Union College of Boston and specially revised by the author for this volume), on 'A Survey of Social Interests' (from *Harvard Law Review*, 1943) and on 'Interpretation of Statutes' (a reprint of Pound's Introduction to Sloovere's *Cases on the Interpretation of Statutes*), Wambaugh on 'How to Use Decisions and Statutes' (from Cooley on *Brief Making*), and Wigmore on 'Jury Trial Rules of Evidence' (from *A Century of Progress*, 1835—1935); although the actual texts of these writings may not be so easily accessible on this side of the Atlantic, the names of the writers are sufficient indication of the lines that they follow and sufficient guarantee of their authority. But Munroe Smith's 'Elements of Law'—a long section of over 200 pages—calls for a word of comment, as the author's name is not so well known here and, except for the introductory chapter on Jurisprudence, the whole section consists of hitherto unpublished material made up by the editor from his class-room notes of Munroe Smith's lectures at Columbia Law School. What a good teacher Munroe Smith must have been! There is perhaps little that is 'original' in his thought on Jurisprudence, but the simplicity and lucidity of his treatment must awaken the despairing admiration of any teacher who has grappled with the task of introducing students to the fundamental questions of theory which lie beneath the structure of practical law. Following the chapter on Jurisprudence comes a history of legal systems such as one could wish to see included in the first year programme of every law school. It covers Ancient Law, Mediaeval and Feudal Law, Canon Law, City Law and the Law Merchant, the Reception of Roman Law, the development of the various European systems and the progress of Codification, and then turns to the history of Common Law and of Equity. There is a suggestive, though brief, chapter on the influence of Roman Law on English Law, in which is mentioned (alas, no more than mentioned) something that is easily overlooked in histories of private law, namely, the reciprocal influence of English constitutional and criminal law on the public law of Continental systems. There are chapters on the world-wide

diffusion of European law, on the sources of American law and on Codification in the United States. These latter chapters contain much that will be interesting not merely to the undergraduate student and his teacher, especially concerning the reception of European law (Spanish, Dutch, French and English) in the various States of the Union. But in all his chapters Munroe Smith displays the same virtues of exposition, painting in broad outline but always clearly, vividly, and with a sense of proportion. The only matter of regret is that the editor did not have his text more carefully checked. There are too many small slips, especially in the spelling of Latin words, which may be pardonable in a student's notebook but which should have been corrected before publication. And the statement on p. 224 to the effect that Augustus gave the *ius respondendi* to certain of the 'judges' should perhaps be altered or annotated; on reading the page carefully it seems that Munroe Smith regarded the *peritus* as the real judge, distinguishing him from the *iudex*, but the student who copies his words as printed may well suffer in an examination.

What are we to say of *Studying Law* as a whole? The method of compilation necessarily involves a good deal of repetition, for instance, the history of the common law is recounted by Zane and by Pound and by Munroe Smith. But there is no harm in this; indeed, the student may benefit from being able to compare the treatment of the same subject by different masters. Some of it, for instance Goodhart on 'Ratio Decidendi', is too advanced for the utter beginner. But there is much which the good student could read with interest at an early stage in his career and much which could be profitably read and re-read at intervals even after the lawyer has left the law school for professional life. It would make an excellent gift for the prize-winners in a first year class.

To the juristic philosopher it presents some interest as a document illustrative, both in what is explicitly said and in what is taken for granted, of the American outlook on legal problems, a characteristic combination of sociological method with individualistic principles. Law, as one gathers especially from the extracts from Pound and from Munroe Smith, is to be considered not as a system of abstract rules but as a set of practical operations affecting social life. In this the socialist and the communist would agree. But to these American writers the social life which is good and which law should promote is one based on private property, individual enterprise and, within limits, free competition. The activity of the individual must often be checked in the interest of the general security or well-being, but there is a social interest in individual freedom and in 'individual self-assertion' which

must equally be maintained. There is little, if any, indication that other theories, denying private property and individual economic enterprise or denying altogether the value of the individual in himself, can be and have been held. It might be good for the American student at least to be told of the existence of such theories.

A. H. CAMPBELL.

CASES ON THE LAW OF CONTRACT. By G. C. CHESHIRE, D.C.L., F.B.A., of Lincoln's Inn, Barrister-at-Law, Vinerian Professor of English Law in the University of Oxford, Fellow of All Souls College, Oxford, and C. H. S. FIFOOT, M.A., Barrister-at-Law, Fellow of Hertford College, Oxford, All Souls Reader in English Law. (London: Butterworth & Co. (Publishers), Ltd. 1946. xxiv and 432 pp. 30s. net.)

THE appearance of a new book of cases presents the opportunity for a brief investigation of the rôle of the case-book in legal education.

The idea of a collection of cases is not novel (Smith's *Leading Cases*, for instance, was first published in 1837) though it was only in the later nineteenth century that the case-book came into common use. These books were bulky, costly and contained a vast amount of commentary; they reproduced the judgments in their entirety, and the statement of facts and counsel's arguments at great length.

There soon appeared, however, a new type of case-book, wherein the facts of the cases were set out simply and succinctly and the important parts only of the judgments were transcribed. In these books the commentary was drastically reduced: in some to short explanatory supplements, and in others to a mere citation of further cases.

Now, though there are examples of case-books designed to meet the requirements of the practitioner (or even the teacher) yet most of them are written primarily for the student. It would appear clear, despite the professed hope of several writers, that no one book can satisfactorily meet the needs of these two classes. This is because: firstly, the practitioner calls for a complete and exact reproduction of the whole case, whereas the student desires some abridgment; and secondly, the scope and character of the commentary demanded by the practitioner is wholly unsuitable for the student. (It is an exceptional student who can make more than a superficial use of the exposition contained in a book such as *Cases on Equity* by Chafee & Simpson.)

Be that as it may, what is being discussed here is the case-book written for the student.

Before considering the controversial question of abridgment, it is necessary to make some answer to those who maintain that the student should make straight for the Reports because there is no place for 'potted law'. Apart from the advantages of possessing some collection of cases for use when the Reports are temporarily or permanently inaccessible, the time saved and the clear guide afforded by the case-book more than justifies its existence. 'The student, when he . . . attempts to follow this advice [*viz.*, that 'he ought early to habituate himself to the perusal of Reports at large, instead of pinning his faith upon the commentaries and abridgments of the treatise writers']. . . . finds himself astray amid the accumulated lore which the Reports present to him . . . ; he feels his judgment perplexed, his choice distracted, and his immediate wish is, that some guide would direct him to the *leading* cases. . . .' Thus writes Smith in 1837, and what he says is as true now as it was then. But conservation of time is the more compelling reason. This is brought out vividly by Dr. Glanville Williams in his *Learning the Law*. He shows that the university student has but four to eight weeks for each subject; and he states that 'into this alarmingly short space he must fit attendance at lectures, the reading of the textbook, wider reading in the library, and revision, as well as the manifold activities that properly occupy the undergraduate outside his work'. He continues: 'Those reading for professional examinations, particularly those engaged in office work during the day, will have less rather than more time than undergraduates.' (2nd ed. at p. 36.)

Is it necessary or even advisable to abridge the judgment? This is the question that now presents itself, and is one that has given rise to much difference of opinion. There are, of course, infinite degrees of abridgment (for this depends on the predilection of the particular writer) but for present purposes the case-books may be placed into two main categories: firstly, where the judgment is transcribed in its entirety; and secondly, where only that portion of the judgment containing the *ratio decidendi* is reproduced.

Professor Cheshire and Mr. Fifoot favour the former method, though they would appear to admit that the omission of that part of a judgment which deals with a subsidiary point is occasionally permissible (pp. 121, 315). They state in the Preface: 'We had no hesitation' in adopting this method, which 'while superficially less alluring . . . [is yet] . . . at once more scholarly and more practical'. The reason they adduce in support of this

choice is that the student, 'if he is to be more than a mere mechanic, cannot be introduced too soon to his original sources. By following the Judge's mind from the start to the finish of a case, he will not only accustom himself to the "flow" of English law, but will learn to search for the *ratio decidendi* and begin to practise the art of distinction'.

A faulty premise underlies this assumption, however, and this is clearly demonstrated by Mr. H. J. S. Jenkins: 'Granted that students should be encouraged to read judgments *in extenso*. But it by no means follows that such encouragement is likely to emerge from a case-book based upon this theory: the weak student is liable to be discouraged by the unhelpful totality of the unabridged judgments, [it is submitted that this applies with equal force to the average student] whereas the able student can quickly exhaust the relatively few judgments that such a case-book normally provides. The *non sequitur* seems so clear that one may be tempted to wonder cynically whether the real beneficiaries of this theory are the authors or editors themselves, for whom the self-imposed rule provides ready-made exemption from the perilous labour of abridging judgments.' (Preface to Cockle & Hibbert *Cases on the Common Law*.) After all, to give a homely if extreme analogy, one would look askance at the mother who presents her young child with logarithm tables instead of the more familiar abacus when he is learning to count. In short, except in the case of the exceptional student, the judgment-in-full case-book is of but limited value.

A case-book which adopts the abridged-judgment method, on the other hand, has much in its favour. Firstly, it can if properly used be of great assistance in teaching the student the technique of case-law, for 'one of the most valuable uses to which such a case-book can be put is to compare the extract of the judgment with the original'. (Sweet & Maxwell, *Guide to the Legal Profession*, Sect. II, p. 9.) The student is thus encouraged to refer to the Reports, and he will find when he comes to cases which are not included in the case-book that he is able to find and extract the *ratio decidendi* with ever-increasing facility. Secondly, it will enable him to save much time—a precious commodity, as Dr. Williams has shown. The student simply cannot spare the time either to make his own notebook of cases (though such a course would undoubtedly be beneficial) or to read through the whole of the statement of facts and the whole of the judgment in each case cited. Thirdly, it contains many more cases than a judgment-in-full case-book of like size. Professor Cheshire and Mr. Fifoot, for instance, have been able to

include but seventy-eight cases in a volume of over four hundred pages. Fourthly, it is particularly useful in the lecture room. As Caporn puts it: 'A lecturer can explain and illustrate principles by reference to decided cases so much more successfully if the student has before him the essential facts and extracts from the judgment bearing upon the point.' (*Selected Cases Illustrating the Law of Contracts.*) Lastly, it is invaluable for the purpose of revision.

But the peculiar advantage of the abridged-judgment method is that it puts case-law in its proper perspective. The judgment-in-full method, on the other hand, tends to obscure the true position, which is that the study of cases is a means to an end and not an end in itself. 'Law, considered as a science,' says Langdell, 'consists of certain principles or doctrines. . . . Each of these doctrines has arrived at its present state by slow degrees; in other words, it is a growth, extending in many cases through the centuries.' The student, if he is to emerge from his legal training as a true lawyer, must have a firm grasp of these doctrines: he must acquire 'such a mastery of these as to be able to apply them with constant facility and certainty to the ever-tangled skein of human affairs. . . .' (*Cases on Contracts.*) If the student is to gain this mastery, he must not allow case-law to assume undue prominence: he must bear in mind always that cases are illustrative merely of the fundamental principles of law. If this premise be true, then in general it is not essential for the student to read the whole judgment.

The next question, that of the statement of facts, though closely connected with the above is in fact quite distinct therefrom.

It would appear—from a hurried glance at a number of case-books—that those writers who adopt the judgment-in-full method present also the facts in full. Why this should be so is not quite clear. It is submitted that the student is best served by a simplified and concise summary of the essential facts. Professor Cheshire and Mr. Fifoot, however, set out all the facts at length, on the ground (apparently) that the student will thereby discover 'the difference between answering academic questions framed upon nicely tabulated sets of facts and himself seeking the essential features of a long and complicated transaction'. And with this latter end in view, they have included in their book 'a few cases where the solution is seen to depend, not so much on the formulation of general principle, as on the marshalling of events'.

Now, it cannot be denied that it is essential for the practitioner to be able to pick out what is important in the statement of facts; but the student is primarily if not

solely concerned with legal principles. Surely, then, this ability is one which he must acquire when in practice? The student must strive for a thorough mastery of principle, and this task is made infinitely more difficult if he is presented with a long and complicated transaction with no indication whatsoever as to which of the facts are important. Take, for example, the case of *Hirachand Punamchand* v. *Temple* (p. 46). All the student need know, if he is to grasp the principle involved, is: the indebtedness of A to B; the offer by C to B of a lesser sum 'in full settlement'; and B's acceptance by conduct of this offer. (In order to vivify the case for the student, thereby impressing it on his memory, a few additional facts may well be given: *e.g.*, B is a money-lender carrying on business in India; C is A's father, etc.) But in the case-book the facts run to two pages, two-thirds of which is taken up by the contents of seven different letters. In many of the cases—see *Vandepitte* v. *Preferred Accident Insurance Corporation of New York* (p. 298); *Howatson* v. *Webb* (p. 119)—the statements of facts are so formidable as hopelessly to confuse or even frighten-off the most assiduous of students. (In which case, it may be added, the *Case-book* may indirectly fulfil its avowed object of 'introducing' the student to his 'original sources'; for he is likely to go in despair to the Reports, if only for the purpose of procuring the *précis* of facts from the head-note!)

More particularly, the arguments already raised in support of the abridged-judgment method can be applied here. Thus the student is not likely to pick on some trivial fact as the operative one if he is presented with a short statement of the essential facts; nor will he squander precious time in an attempt to unravel an involved situation. Moreover, a case-book that sets out the facts in full can be of but limited value in the lecture room or for the purpose of revision. The conclusion is inescapable: the presentation of the facts in full is of as little assistance to the student as the transcription of the judgment in its entirety.

In fairness to professor Cheshire and Mr. Fifoot, however, it must be pointed out that in their textbook there are to be found excellent summaries of the facts of many cases; and that in their case-book they state expressly: 'The present volume is designed primarily to accompany our book on the Law of Contract.' This being so, it might be argued that the case-book is the proper place to set out the facts in full. But if the main contention put forward above be accepted, this argument falls to the ground, and the presentation of the full facts in the case-book involves so much waste of paper. In any event, a number of cases which appear in

their case-book are not discussed at all in the textbook, but are given there as footnote references only. (See, for instance, *Percival, Ltd.* v. *L. C. C. Asylums and Mental Deficiency Committee* (p. 27); *Ellis* v. *Torrington* (p. 339).)

In conclusion, a word on some specific aspects of this case-book:—

1. The statement of legal principle at the head of each case is admirable both as to scope and content, and should be of great assistance to the student.

2. The book gives a fair if somewhat limited picture of the Law of Contract. As to the cases selected, this of course is a personal matter (the writer frequently having in mind his own textbook or course of lectures). No point will be taken here, for law teachers are not always in agreement on this question.

3. The inclusion in the second edition of the following three features would, it is felt, enhance the usefulness of this book:—

(a) supplementary notes of an explanatory nature. These should be short, for the case-book should not encroach on the province of the textbook;

(b) a brief résumé of the dissenting judgment, if there be one;

(c) a glossary of technical terms. This should include such expressions as: 'postea'; 'non-suit'; 'demurrer'; etc. (pp. 409, 252, 35).

J. D. Hayman.

The Effect of War on Contracts. By George J. Webber, ll.d. Second Edition by the author. (London: The Solicitors' Law Stationery Society, Ltd. 1946. lxviii, and 802 pp. (with index). £3 17s. 6d. net.)

I discussed the first edition of this book at some length in 4 Mod. L. R. 233 and I do not propose to go over the ground again. Dr. Webber has provided a painstaking and erudite new edition, in the course of which he has added over 200 pages of new matter. My impression is that the book is now overweighted, and the price has certainly gone to a point at which most practitioners will jib. Dr. Webber himself states that the new edition is three times as large as the first—'one third of the book is entirely new: a new presentation of matters, old and new. Of the rest vast portions have been augmented, or recast, or entirely rewritten'. I do not have the impression of quite such a complete reconstruction, but certainly the book has been more thoroughly overhauled than is usual with a second edition.

There are two new chapters in Part I: of these that on 'War: Duration and Termination' contains a little of the old material, and provides a useful prologue, since the original work started rather abruptly. There follows a lengthy chapter on 'Emergency Powers: Effect on Contracts': for Dr. Webber fears that these or their effects will long be with us. The remainder of Part I has not been radically touched.

Part II which deals with the effect of war on various specialised branches of contract, most of which are naturally of the commercial variety, has been substantially expanded under two heads, *viz.*, Insurance of Property and Contract of Service. A great deal of the chapter on Insurance is concerned with highly technical matters of marine insurance and particularly the long and somewhat conflicting line of cases dealing with 'warlike operations'. The wisdom of treating such matters at great length in a general work seems to me highly questionable, though I have no fault to find with Dr. Webber's treatment of the topic. Under Contract of Service the expansion is justifiable since we are here confronted with the Essential Work Order and the Reinstatement in Civil Employment Act, 1944, which give rise to serious difficulties and Dr. Webber's treatment of which will be found helpful.

Frustration of Contract which is the core of the book is now considered in two parts, the one on Frustration and the other on its Effects. The gusto with which Dr. Webber attacked the difficult problems involved in this topic in the first edition tends to become fanatical prolixity. He was, and remains, a convinced adherent of what may be called the Haldane-Wright view of frustration. It seems to me that the *Constantine Case*, [1942] A.C. 154 authoritatively placed the doctrine of frustration upon the basis of 'the presumed common intention of the parties'. Dr. Webber struggles hard against this view of the matter and advances a forcible argument in support of his case. Unfortunately his enthusiasm somewhat detracts from his lucidity, and while his chapters will undoubtedly be read with great interest by all who are reasonably conversant with the subject I am afraid that the result for others will be confusion.

In these parts Dr. Webber has a new chapter on 'No Frustration of Contract' which is nearly fifty pages long. The scientific treatment of the subject does not really lend itself to a division on the lines of contracts which are and are not frustrated because the result depends on the supervening circumstances, indeed the chapter division is quite unrealistic. Again he has new chapters on the *Fibrosa Case*, on Quasi Contract, and on the legislative intervention which led up to the Law Reform (Frustrated Contracts) Act, 1943, of which

he gives an excellent detailed discussion which can be profitably compared with the monograph by Dr. Glanville Williams.

The number of Appendices has also been very much expanded. Most of these have been called for by the developing circumstances of the late war, but it is a little difficult to see the reason for one on Recent Insurance Cases which one would have expected to find dealt with in the body of the book. Why should the case of the *Atheltemplar* (1945), 61 T.L.R. 454 be dealt with here, and the similar case of the *Coxwold*, [1942] A.C. 691 in the text?—a number of these cases are decisions of U.S. Courts.

CHORLEY.

LAW AND PRACTICE OF DIVORCE AND MATRIMONIAL CAUSES. By D. TOLSTOY, Barrister-at-Law. (London: Sweet and Maxwell, Ltd. 1946. xxxv and 386 pp. 30s. net.)

THIS book is intended to serve the purposes of the practitioner who wants a short work of reference and the student who is taking this subject in the Solicitors' Finals Examination. Although doubtful points are raised and answered in an interesting way, it is mainly uncritical. In view of his avowed objects, however, the author cannot be taken to task for this and is to be congratulated on a remarkably accurate piece of work.

Chapters I and II dealing with the Courts and Jurisdiction are somewhat concise, and it should be made plain on p. 2, as it is on p. 231, that the powers of district registrars on applications for ancillary relief are limited. Moreover, in Chapter II, the important practical point is omitted that, if the principal decree of a foreign Court is not recognised by the English Courts, ancillary orders such as those for maintenance will also not be recognised (*Simons* v. *Simons*, [1939] 1 K.B. 490).

Chapters III, IV, V and VI dealing respectively with Dissolution, Judicial Separation, Restitution of Conjugal Rights and Nullity contain an admirable summary of the law down to August 1, 1945. From the practical point of view, however, the possibility of proceeding for judicial separation in cases of adultery or cruelty within three years of the marriage should have been mentioned at the beginning of Chapter III, just as the financial utility of proceedings for restitution of conjugal rights to a wife who has been deserted for less than three years might have been indicated in Chapter VI. From the theoretical point of view, the remark on p. 66 that there is 'no point in turning a decree of restitution of conjugal rights into one of judicial separation unless the petitioner wishes to stop at the latter' requires elaboration. Moreover, it is doubtful whether the reason why a

separation agreement is not a bar to a petition for restitution of conjugal rights, if it is not set up by the respondent, is that given on p. 72 to the effect that such agreements were not recognised in the Ecclesiastical Courts. In restitution cases, unlike divorce cases, 'it is to be borne in mind that the right to refuse cohabitation by reason of the existence of a separation deed is a purely personal right of the party sued, the assertion of which does not apparently serve any public interest' (*Williams* v. *Williams*, [1921] P. 131 at p. 134).

The concluding chapters of Part I which is confined to the substantive law are lucid and accurate but, in Chapter IX, reference should have been made to the desirability of obtaining a nominal order for maintenance after divorce for a wife in circumstances that do not justify a substantial award. The case of *Reid* v. *Reid*, [1926] P. 1 should also have been cited, as illustrating a means whereby a practical difficulty which may arise, where there is a separation agreement which is not terminated by divorce, may be surmounted. The case of *Joss* v. *Joss*, [1943] P. 18 is a further omission of minor importance from this chapter.

Part II deals with the relevant High Court practice, and, although from the point of view of the student, one sometimes wonders whether the practice could not be adequately dealt with while the substantive law is being treated, Mr. Tolstoy's account should prove most helpful. It contains just the right amount of forms for the student's purposes, and attention is drawn to the following minor inaccuracies simply for consideration when a second edition which should be necessitated as much by the merits of the book as by the pace of the development of our divorce laws comes to be prepared. (i) P. 190—The marriage certificate is filed with the petition not with the application for the registrar's certificate. (ii) P. 191 (n)—An affidavit which does not contain the residential address of the solicitor's managing clerk will not be accepted by the divorce registry. (iii) P. 199 (n)—Reference should be made to *Campbell* v. *Campbell*, [1940] P. 90. (iv) Chapter XVI should contain a reference to the practice of obtaining consent orders as to maintenance on summons to the registrar. (v) P. 223—It should be made clear that an ordinary copy and not an office copy of the affidavit in support is served with an originating summons.

The book concludes with a third part on matrimonial causes before magistrates which should be of great help to the practitioner as well as to the student, because the law is set out in great detail with several stimulating suggestions.

RUPERT CROSS.

HISTORY OF ROMAN LEGAL SCIENCE. By F. SCHULZ. (Oxford: Clarendon Press. 1946. xvi and 358 pp.)

THIS is an admirable work, explaining a leading scholar's opinions about—not Roman law, but—the way in which the Roman lawyers worked, their social position, their organisation, their aims and methods, and their literature. It is a joy to read (for which not a little praise is due to the translator, Professor De Zulueta of Oxford) and may be recommended to anyone, whether a specialist or not, interested in a fascinating chapter from the history of human thought.

The author possesses a vast knowledge of the relevant material, legal or lay, and is full of ideas by which it may be brought to life. To mention a few, he distinguishes between 'cautelary' and 'judicial' pronouncements of the priests of ancient Rome, *i.e.*, between sacerdotal advice on action to be taken and sacerdotal verdicts on the legality of an act performed (pp. 16 ff.). The early jurists were averse to legislation, and neither they nor the classics stated reasons when deciding a case. Both features are here connected with the aristocratic origins of the jurists: they disliked committing themselves in advance, and a decision was accepted because of the authority of him who gave it. Moreover, a student attached himself not to a University but to a great practising jurist; he thus became familiar with practice rather than general, academic concepts (pp. 24, 56 ff., 60 ff., 124). One of the reasons, the author suggests, why classical literature came to an end with the large commentaries of Ulpian was that the writing of monographs had not been cultivated (p. 257). We are warned not to underrate post-classical law: only in the Dominate, a bureaucratic system, most original work was done by the anonymous authors of imperial rescripts, instead of by jurists giving private advice or writing books (p. 264). All these points, and many others, are illuminating.

In examining the transmission of classical Roman works, the author is frequently guilty of over-subtle and over-critical argument. Here is a major example. He claims that Sabinus's *Ius Civile* was devoted to prætorian law as much as to civil; the term *ius civile*, he asserts, then meant 'private law' as opposed to 'public law'. As is well known, however, *pignus*, *depositum* and *commodatum* are among the topics which apparently did not occur in the *Ius Civile*. The explanation of this gap, according to Schulz, is not that these institutions were still prætorian (that, he urges, did not exclude them) but that the *Ius Civile* was

mere imperfect lecture-notes, published after Sabinus's death. If this were all, one might regard the thesis as arguable though unlikely. But when we come to real contract in Gaius's *Institutes*, we again look in vain for *pignus*, *depositum* and *commodatum*; and Schulz assumes that Gaius's *Institutes*, too, were imperfect lecture-notes published posthumously (pp. 72, 156 ff., 260). By now the limits of the arguable have been over-stepped. The same three topics, we are asked to believe, were omitted as a result of careless, posthumous editing in both cases, that of Sabinus and that of Gaius! And what about Mucius, the Republican jurist, whose *Ius Civile* also seems to have been silent on *pignus*, *depositum* and *commodatum*? Did he also write lecture-notes only, did they also appear after his death, and was it again just these institutions which dropped out? The conventional, less subtle explanation of all this is preferable. Of Gaius at least it is certain—and Schulz admits it (p. 159)—that he considered prætorian law only in so far as it affected civil. Therefore, of him at least, it is fairly safe to say that he disregarded *pignus*, *depositum* and *commodatum* because, though civil by his time, they had not been civil when his sources were composed. This strongly suggests that the absence of these matters from Sabinus—and Mucius—is due to the simple fact that, in the late Republic and early Principate, they did not yet belong to the civil law. Which conclusion, in turn, takes us back to the orthodox view that those jurists, by *ius civile*, did mean 'civil law' as distinct from 'prætorian law'.

Of course, the real motive inducing Schulz to propound a thesis like the one outlined, which starts from an unattested meaning of *ius civile* and leads up to a series of uncanny coincidences, is the dogma that all classics were always precise: none of them, that is, could have brought out a work as full of inexactitudes as Gaius's *Institutes*. For some sound remarks on this question, readers may be referred to Buckland, *Juridical Review*, 1936, pp. 339 ff. Here a more general point may be made. It is interesting to note that much the same state of mind may be produced by lack of criticism and by an excess of it. The authors of former centuries who treated all Roman law as one whole, without distinguishing between the strands of different times, resorted to the most artificial solutions in order to reconcile conflicting texts. The German name for their methods is *Pandektenharmonistik*. In the past twenty years a kind of creed has arisen among the very 'advanced' critics, to which the evidence is made to conform; and one is struck by the

essential similarity of the methods used to those of the pre-critical period. Future historians of Roman legal studies of the twentieth century may well be tempted to speak of *Interpolationenharmonistik*.

DAVID DAUBE.

THE PALESTINE INCOME TAX ORDINANCE. Edited by G. EICHELGRÜN. (Haifa: Paltax Publishers. London: Sweet & Maxwell, Ltd. 1945. 50 pp. 10s. net.)

THE PALESTINE INCOME TAX GUIDE. By G. EICHELGRÜN. (Haifa: Paltax Publishers. London: Sweet & Maxwell, Ltd. 1945. xviii and 235 pp. £P.3 10s.)

INCOME tax in Palestine is imposed only upon such profits as accrue in, are derived from or are received in Palestine; unlike the British tax code, liability to tax does not depend on residence. Mr. Eichelgrün points out that Palestine income tax practice has come—apparently as a result of Court decisions there—to mean British tax practice suitably adapted to local circumstances and laws. In his work he has, accordingly, quoted at length from the tax decisions of our Courts and also from leading English text-book writers, to whose opinions he seems, perhaps, to attach rather overmuch 'authority'. In an endeavour to make a dry subject interesting, Mr. Eichelgrün has interwoven into his exposition of the Ordinance not only law but also history, economics and commerce; what the work gains thereby in readability, it somewhat loses in lucidity.

Since many professional men in Palestine use English text-books, the author in his edition of the Ordinance (p. 4) has compared its relevant sections with their prototypes in the British Income Tax Acts, thereby enabling references in the text-books to be readily adapted to the Ordinance. The Guide, which is well documented and indexed, can be recommended to anyone concerned with Palestine income tax.

A. FARNSWORTH.

UNITED NATIONS AGREEMENTS. Edited by M. B. SCHNAPPER. Foreword by ARTHUR SWEETSER. (Washington: American Council on Public Affairs. 1944. 376 pp.)

A COLLECTION of the texts of agreements between all or some of the United Nations, arranged (a) by subject-matters, (b) by the countries concerned, (c) by the governmental or international agencies concerned. Not surprisingly, some of the agreements listed, such as the agreement between Poland and Czechoslovakia, are already out of date.

THE JUSTICE OF THE PEACE TODAY AND TOMORROW. By A SUB-COMMITTEE OF THE HALDANE SOCIETY. (London: Victor Gollancz, Ltd. 1946. 31 pp. 6d.)

IN this useful pamphlet the Haldane Society set out their views as to the reform of the system of lay justices. The society consists of socialist lawyers, and it is interesting to note that they accept the system of lay magistrates as good in itself, and preferable to one of paid stipendiaries. Indeed they reject the proposals of the Conservative Party Committee for the establishment of paid chairmen largely on the ground that it would probably destroy the independence of the lay element.

The Society considers that reform is to be found in three main directions. Firstly, by democratising the Lord Lieutenants' Advisory Committee; secondly, by insisting that newly appointed magistrates should go through some course of training; and thirdly, by putting into force the proposals of the Roche Committee on Magistrates Clerks (see M.L.R., Vol. VIII, p. 1).

The main defect of this report is that the authors seem so little aware of the recent literature on this subject.

C.

POWERS AND DUTIES ATTRIBUTED TO THE LEAGUE OF NATIONS BY INTERNATIONAL TREATIES. (Geneva: League of Nations. Obtainable from Allen & Unwin, Ltd. 1944. 2s. 6d. net.)

A SYSTEMATIC arrangement, under twenty heads, of the different functions entrusted, in International Treaties, Conventions, etc., to the League of Nations. Mainly of historical interest, but also useful as material for future international authorities. The range of functions listed is wide, but the powers of the League limited.

ARBEID; SOCIAAL MAANDBLAD. First Year, No. 1, N. Samson N. V. (Alphen aan den Rijn, Netherlands.)

THESE two new Dutch periodicals are devoted to labour law, labour market problems, social insurance and other labour problems. *Arbeid* gives a monthly survey of practical issues, while the bias of the *Sociaal Maandblad* is more on the side of theoretical and scientific research. The first numbers are of great interest in that they show that the high standard of Dutch legal learning and analysis in the field of industrial law has survived the occupation. Both theory and practice are very much alive, and important new developments, especially in social insurance, can be expected in the near future.

O. K.-F.